

83-1077

Office-Supreme Court, U.S.

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DEC 27 1983

ALEXANDER L. STEVENS,
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No. ...

IN THE

Supreme Court of the United States

October Term, 1983

DENNIS PARTEE,

Petitioner,

vs.

SAN DIEGO CHARGERS FOOTBALL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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Questions Presented.

1. Does this Court's decision in *Flood v. Kuhn*, 407 U.S. 258 (1972), a decision which this Court carefully and expressly qualified in its future application to *professional baseball* prevent California from enforcing its own anti-trust statute against anti-competitive rules in *professional football* simply because the challenged activity is engaged in interstate commerce and is nationwide in character?

2. Does this Court's decision in *Flood v. Kuhn*, 407 U.S. 258 (1972), compel the California state courts to withhold enforcement of the state's own anti-trust law — parallel to federal law — against the clearly anti-competitive rules of a California professional football business against a California resident?

3. May the California Supreme Court rely exclusively upon hypothetical burdens on interstate commerce in withholding enforcement of its parallel state anti-trust statute as an impermissible burden on interstate commerce?

In response to these questions, the California Supreme Court has said "yes" while the New Mexico Supreme Court has said "no." Accordingly, Dennis Partee would respectfully request this Court grant his petition for certiorari in order to define the outer limits of state anti-trust regulation on interstate commerce.*

*While many courts seem to erroneously interchange a proper commerce clause analysis with that of the doctrine of preemption, Partee believes this Court has never specifically addressed the question of when a state's enforcement of its own anti-trust statute constitutes an undue burden on interstate commerce. It appears in the past, however, that this Court has generally deferred to state regulation in this area. See *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978); *Giboney v. Empire Storage and Ice Company*, 336 U.S. 490 (1949); *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944); *Watson v. Buck*, 313 U.S. 387 (1941); *Tigner v. Texas*, 310 U.S. 141 (1940); *Gibbs v. Buick*, 307 U.S. 66 (1939); *Puerto Rico v. Shell Company*, 302 U.S. 253 (1937); *Straus v. American Publishers Association*, 231 U.S. 222 (1913); *Standard Oil v. Tennessee*, 217 U.S. 413 (1910); and *Waters-Pierce Oil Company v. Texas*, 212 U.S. 86 (1909).

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**PETITION FOR WRIT OF CERTIORARI
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STATE OF CALIFORNIA.**

The petitioner, Dennis Partee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California, which affirmed the decision of the California Court of Appeal, Fourth District, that, in accordance with *Flood v. Kuhn*, 407 U.S. 258 (1972), California's anti-trust statute — the Cartwright Act — is an undue burden on interstate commerce and may not be enforced against the anti-competitive employment rules utilized by the San Diego Chargers of the National Football League.

Opinions Below.

The Opinion of the California Supreme Court issued on August 29, 1983, is set forth in Appendix 1, *infra*. The Opinion of the California Court of Appeal, Fourth District,

Division One, is set forth in Appendix 2, *infra*. The Findings of Fact and Conclusions of Law of the San Diego County Superior Court for the State of California are set forth in Appendix 3, *infra*.

Jurisdiction.

The Opinion of the California Supreme Court was filed on August 29, 1983, and a timely Petition for Rehearing was denied on September 28, 1983. Jurisdiction of this Court is proper pursuant to 28 U.S.C.A. § 1257(3).

Background.

Dennis Partee was an outstanding punter and placekicker for the San Diego Chargers from 1968 to 1976. While his old-fashioned straight-leg form may never cause National Football League fans to forget Lou Groza or George Blanda, nor did he ever quite reach the pinnacle of 23 consecutive field goals as did Mark Moseley of the Washington Redskins during the 1981 and 1982 seasons, Partee nevertheless kicked his way to over thirty all-time Charger records. Then, in 1976, Partee injured his lower back, and despite his quality performances and team loyalty for some eight NFL seasons, the Chargers inexcusably cut him from the team while he was injured and refused to pay him his \$30,550 salary.

Partee filed suit against the Chargers seeking to recover his salary for the 1976 season.¹ In addition, Partee sought damages under California's anti-trust statute — the Cartwright Act (Business and Professions Code § 16700 *et seq.*) — for the Chargers enforcement of five NFL operating rules: the draft, the option clause, the Rozelle rule, the no tam-

¹At trial, Partee recovered damages for his 1976 contract, and the San Diego Chargers never appealed this portion of the judgment.

pering rule, and the one man rule.²

Having independently heard the evidence through the testimony of such notable experts as Ed Garvey, then executive director of the National Football League Players Association, and premier player representative Howard Slusher, as to the anti-competitive employment practices carried out by the San Diego Chargers, and utilizing the doctrine of collateral estoppel,³ the trial court found, with the exception

²The draft is a selection system whereby the respective NFL teams are awarded the initial rights to negotiate exclusively with football players graduating from college.

The option clause is a provision of the NFL standard player contract, which grants the team the right to renew a player's contract for one additional year if the team and player cannot agree to a new contract. After the option year expires, the player becomes a "free agent" and may negotiate in contract with the teams of another league or with other NFL teams subject to the Rozelle rule.

The Rozelle rule is named after the NFL commissioner, Pete Rozelle. This rule provides that if a free agent contracts with another NFL team, the new team must compensate the player's former team with draft choice(s) or other player contracts. If the new and former teams cannot agree as to the compensation, the commissioner arbitrates the matter and determines the compensation.

The no tampering rule prohibits an NFL team from negotiating with a player currently under contract with another NFL team. Also, if one team has the exclusive right to negotiate with a player, no other team may tamper with that player.

The one man rule refers to the commissioner's authority to compel a player to adhere to terms of an operative collective bargaining agreement between the players and the NFL team.

Each one of the above anti-competitive NFL employment rules has been judicially declared to be in violation of the federal anti-trust statute, the Sherman Act. See *Kapp v. National Football League*, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), petition for cert. withdrawn, 434 U.S. 801 (1977); *Smith v. Pro Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1979).

³As stated in footnote 2, *supra*, the federal courts in *Kapp*, *Mackey* and *Smith* have found these rules challenged by Partee to be in clear violation of federal anti-trust law and California may utilize federal decisions under the Sherman Act in applying the Cartwright Act. *Maidland v. Burckle*, 20 Cal.3d 367, 376 (1978). Partee challenged these rules as they existed in 1974 and these same operating rules and practices have since been modified as a result of these federal decisions and the negotiated terms of the collective bargaining agreement entered into between the players and the league.

of the option clause, that the remaining Chargers employment rules were in clear⁴ violation of California's anti-trust statute — the Cartwright Act. In line with this Court's finding, the trial court awarded Partee treble damages and attorney's fees under the Cartwright Act in the sum of \$133,500.00.⁵

The trial court's ruling is grounded in Finding of Fact/Conclusion of Law Numbers 8 and 9, see Appendix 3, page 66:

WITH RESPECT TO THE SIXTH CAUSE OF ACTION REGARDING ANTITRUST VIOLATIONS UNDER THE CARTWRIGHT ACT, THE COURT FINDS THAT BOTH THE SHERMAN ACT AND THE CARTWRIGHT ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE §16720, ET SEQ., APPLY TO THE SITUATION BEFORE THE COURT. THE FACTS OF THIS CASE PRESENT NO UNDUE BURDEN UPON INTERSTATE COMMERCE, NOR IS THERE ANY PREEMPTION OF THE FIELD BY THE SHERMAN ACT OR OTHER FEDERAL STATUTES OR THE CONSTITUTION UNDER THE FACTS PRESENTED IN THIS CASE. (Emphasis added) (See also Finding of Fact/Conclusion of Law No. 19, Appendix 3, page 65.)

The trial court quite properly found that the enforcement of state anti-trust law against these employment rules of the Chargers could not be a burden — much less an "undue

⁴So "clear" was the trial court's ruling that the evidence and the federal decisions on this matter allowed the trial court judge to characterize his duty as nothing more than a "housekeeping problem." R.T. 559.

⁵The amount of damages for anti-trust violations was actually \$103,500.00 which was arrived at by taking the difference of the World Football League's three year \$50,000 offer to Partee and his 1974 salary of \$38,500.00 and tripling it.

burden” — on interstate commerce because:

- The Cartwright Act is not in conflict with the federal law.
- The Cartwright Act parallels the purpose and is harmonious in spirit with the intended ends of the federal law.
- The Cartwright Act and its federal counterpart — the Sherman Act — can be enforced concurrently.

Moreover, as a result of the collective bargaining agreements entered into between the National Football League Players Association and the National Football League, the limited facts of Dennis Partee’s case left little room to dispute any of the following:

- Every significant professional football anti-trust case — *Mackey, Kapp, Smith* — involving the same NFL rules as Partee challenged, has found these rules to be in violation of anti-trust law.
- These rules have never been further challenged, nor could they be, as a result of the class action settlement reached in the case of *Alexander v. NFL*, 1977-2 trade cases (CCH) ¶ 61730(d) Minn. (1977), which states:
 - Members of the plaintiff class in the NFLPA itself *covenant not to sue* or support financially or administratively any suit against the NFL, the management council, or *any club* relating to the NFL rules as they existed *and will* exist from the 1972 season through and including the duration of the currently collective bargaining agreement.
- However, Dennis Partee was not a member of the *Alexander* class.
- As a result, the *Alexander* decision expressly allowed Dennis Partee to pursue his anti-trust action in any forum.

- This covenant not to sue *does not apply* to breach of contract suits or to suits other than *Mackey and Alexander*, pending prior to March 14, 1977. See *Alexander*, *supra*, at 72992. [Partee's suit was already pending.]

On appeal, the Chargers were successful in alarming the appellate court to the conclusion that should Partee be able to enforce California's anti-trust statute to these NFL rules, the "league [NFL] would be virtually destroyed by such diversity of application of individual state rules." See Court of Appeal Opinion, Appendix 2, page 59.

The California Supreme Court granted Partee's request for protection under state law against the already adjudicated anti-competitive practices of the Chargers. However, in an eleven-page opinion which might be characterized in football terms as a "bump and run," the California Supreme Court affirmed (with a 49-page dissent). The California Supreme Court relied upon a portion of the opinion — and certainly not the holding — in *Flood v. Kuhn*, *supra*. The critical language which the California Supreme Court extrapolated from the *Flood* decision (at pp. 284-285) was:

The petitioner's argument as to the application of state anti-trust laws deserves a word. Judge Cooper rejected the state law claims because the state anti-trust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of baseball and its reserve system.' 316 F.Supp., at 280. The Court of Appeals, in affirming, stated, '[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state anti-trust law.' 443 F.2d, at 268. As applied to organized baseball, and in light of this court's observations and holdings in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position

taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims.

The California Supreme Court did not even consider whether the incidental burden imposed on interstate commerce by the state is "clearly excessive in relation to the putative local benefits" as this Court has recently directed in *Edgar v. Mite Corp.*, ___ U.S. ___, 102 S.Ct. 2629, 2640 (1982) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Partee does not know what, if any, *actual* "incidental burdens" would be imposed upon the Chargers nor have these actual burdens on interstate commerce been compared with California's "putative local benefits" of protection from anti-competitive employer/employee rules. The California Supreme Court summarily and mysteriously found the above-cited dicta in the *Flood* decision as "statements [which] are clear and unequivocal, and we are not free to disregard them" and "the statements are *applicable* to professional football" (see Appendix 1, page 8, emphasis added).

Partee would respectfully request that this Court grant his petition for certiorari in order to once and for all define the outer limits of state anti-trust regulation of interstate commerce.

ARGUMENT.

I.

The *Flood* Decision Is a Preemption Case Which Represents Nothing More Than a Judicially Acknowledged Aberration of Baseball's Exemption From Anti-Trust Law — Hardly Controlling When Dealing With the Interrelationship Between Professional Football and the Commerce Clause.

In *Flood* — a professional baseball case — Curt Flood challenged professional baseball's reserve system under both the Sherman Act and New York's anti-trust law. In reality, *Flood* was challenging baseball's prolonged (see *Federal Baseball* and *Toolson*) exemption from anti-trust regulation. The historical inertia of our judicial system's fancy with the national pastime created an unreversible caselaw anomaly which is candidly recognized as being "unrealistic, inconsistent or illogical." *Radovich v. National Football League*, 352 U.S. 445, 452 (1957).

Not surprisingly, Justice Blackmun found in pertinent part that:

1. Professional baseball is a business and it is engaged in interstate commerce.
2. With its reserve system enjoying exemption from the federal anti-trust laws, baseball is, in a very distinct sense, *an exception and an anomaly*, and *Federal Baseball* and *Toolson* have become *a: aberration confined to baseball. . . .*
4. Other professional sports operating interstate — football, boxing, basketball, and presumably hockey and golf — *are not so exempt. . . .*

We repeat for this case what was said in *Toolson*:

Without reexamination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Fed-*

eral Baseball Club of Baltimore v. National Football League of Professional Clubs, supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws. *Flood, supra*, citing *Toolson*, 346 U.S. at 357.

Justice Blackmun, having resolved the *Flood* decision on *other grounds*, nevertheless offered a "word" as to the applicability of state anti-trust law to professional baseball:

The petitioner's argument as to the application of state anti-trust laws *deserves a word*. Judge Cooper rejected the state law claims because state anti-trust regulation would *conflict* with federal policy and because national 'uniformity [is required] in any regulation of baseball and its reserve system.' 316 F.Supp. at 280. The court of appeals, in affirming, stated, '[A]s the burden of interstate commerce outweighs the states' interest in regulating *baseball's reserve system*, the commerce clause precludes the application here of state anti-trust law.' 443 F.2d at 268. *As applied to organized baseball, and in light of this Court's observations and holdings in Federal Baseball, in Toolson, in Schubert, in International Boxing, and in Radovich, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims.* (Emphasis added.)

The above-quoted language — riddled with caveats and qualifications yet relied upon by the California Supreme Court herein — can hardly stand for the proposition that states may not utilize their own anti-trust laws in regulating other professional sports, to wit, professional football.

In extracting the "word" from *Flood*, the California Supreme Court went no further in its analysis. There was:

- No determination that "the burden on interstate commerce clearly outweighs the state's legitimate purposes." *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 471 (1981).
- No determination that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- Nor even the simplest approach of "balancing" the state and federal concerns. *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945).

In language whose usefulness is appropriately characterized as "short yardage," the California Supreme Court simply concluded:

There is no justification to conclude that the United States Supreme Court did not fully consider the brief statements from the lower court opinions it chose to quote, approve, and rely upon. The statements are clear and unequivocal, and we are not free to disregard them. Because in all relevant aspects the burden on interstate commerce and the state interest resulting from the player-team league relationship in professional football attacked by Partee is substantially the equivalent of that resulting from the reserve clause in professional baseball, *the statements* are applicable to professional football.

How can "the statements" be applicable to professional football when:

- Unlike baseball, there is no national policy (anomalous or not) toward professional football.
- Unlike baseball, football enjoys no congressional or judicially created exemption from anti-trust laws and in fact is clearly subject to a federal anti-trust regulation.

- Unlike baseball, and the inherent conflict in state regulation, there can be no conflict in state and federal anti-trust regulations which are parallel in their enforcement.

In *Flood*, there was an unavoidable burden on interstate commerce since the state anti-trust law clearly conflicted with the long-time, judicially created, baseball exemption. Such is not the case here, and this Court has specifically found that the sport of professional football, although engaged in interstate commerce, is subject to their federal anti-trust regulation. See *Radovich v. National Football League*, 352 U.S. 445 (1957).

Had the California Supreme Court followed "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce," *Raymond Motor Transportation Inc. v. Rice*, 434 U.S. 429, 441 (1978), it would have been crystal clear that:

- After the *Alexander* decision, Dennis Partee and Joe Beauchamp are the only NFL players who can challenge the anti-competitive rules of the San Diego Chargers.
- Both Dennis Partee and Joe Beauchamp are California residents suing a California team under contracts which are mandated to be interpreted under California law.
- Enforcement of the Cartwright Act to provide redress for the already adjudicated unfair employment practices of the Chargers is the most minimal of the incidental burdens imposed on interstate commerce.

Contrary to the California Supreme Court's holding herein, the New Mexico Supreme Court has rejected the proposition that the *Flood* decision eliminates state anti-trust regulation on interstate activities. In *United Nuclear Corporation v.*

General Atomic Company, 96 N.M. 155, 629 P.2d 231 (1980), General Atomic contended that the uranium supply and utility contracts, which were national in effect and overwhelmingly involved interstate commerce, were outside the reach of New Mexico's state anti-trust statute because of commerce clause limitations. General Atomic, in making arguments similar to those asserted by the Chargers and accepted by the California Supreme Court, contended that "because the uranium market is 'national in scope' and because uranium is 'vital to the military posture of the United States and to federal energy policy,' . . . application of state anti-trust laws to such matters 'is too fraught with a potential for inconsistent results, lack of uniformity and consequent burdens upon interstate commerce.' "

In reviewing these arguments, the New Mexico Supreme Court noted that General Atomic "places principal reliance upon *Flood v. Kuhn*, 407 U.S. 258 (1972) (citations omitted)." In rejecting the *Flood* analysis, the New Mexico Supreme Court logically stated:

If the fact that the commerce at issue involved a national market were enough to render state law invalid, the state's power to regulate anti-competitive practices would be effectively destroyed. See *United Nuclear*, *supra*, at 273.⁶

⁶See also statement by the Massachusetts Supreme Court in *Commonwealth v. McHugh*, 326 Mass. 249, 265 (1950): "Monopolies and restraints of trade are of infinite form and variety . . . Some expend their efforts almost wholly upon interstate commerce and are of only local interest and some almost totally upon interstate commerce and so become matters of national concern, and there are all gradations in between. In many cases, it would be difficult to draw the line. If state laws had no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the states will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare. . . . Especially is this true in view of the immense broadening of the conception of interstate commerce in recent years."

Moreover, the New Mexico Supreme Court offered a practical resolution to the applicability of state anti-trust laws to activities engaged in interstate commerce:

. . . [T]here is little likelihood that in the area of state anti-trust laws an excessive cost of compliance will be imposed by piecemeal state regulation. The cost of compliance is nothing more than refraining from the kind of anti-competitive, predatory trade practices which federal law and the laws of virtually all states condemn. The pervasiveness of anti-trust regulation in the economy demonstrates a uniformity between state and federal laws . . . [T]herefore, the New Mexico Anti-trust Act was applied consistently with the commerce clause of the federal constitution.

There is no precedent in the decisions of this Court for immunizing an entire industry from regulation by *any* state on the ground that *one* state might have a statute which cannot permissibly be applied to the industry. The only proper remedy is displace that *particular state law* — and then, and only then, if an *actual undue* burden on interstate commerce is demonstrated. See, *e.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), where the Court displaced one state statute — but left the railroads subject to less stringent but not necessarily uniform laws of all other states.

In response, the Chargers have continually asserted that professional football is a unique activity engaged in interstate commerce which requires national uniformity that clearly outweighs any purported putative local benefits. However, as this Court reiterated in *Minnesota v. Clover Leaf Creamery Company*, quoting from *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978): “We stress that the commerce clause protects the interstate market, *not particular interstate firms*, from prohibitive or burdensome regulations” (emphasis added). Moreover, “the question is

not whether the acts complained of affect a business engaged in interstate business, but rather, whether the conduct affects the interstate commerce of that business." See *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961), cert. denied, 368 U.S. 875.

Should the decision by the California Supreme Court be allowed to stand, it all but paralyzes enforcement of state anti-trust law against business engaged in interstate commerce. Should professional sports as a whole — a multi-trillion dollar business, with manifold contacts with intrastate, as well as interstate, commerce — be granted a blanket exemption from enforcement of state anti-trust laws, all because this Court in another era created a judicial exemption for the one professional sport — baseball — which at that time⁷ was clearly recognized as the "national pastime"? We think not!

II.

The California Supreme Court Did Not Rule Based Upon the Facts Presented by Partee but Impermissibly Decided the Case Upon Some Hypothetical Burden on Interstate Commerce.

Although a reading of the terse opinion by the California Supreme Court offers little insight as to how the ultimate conclusion was reached, it is clear that the court was not concerned with the facts Partee brought forward but was only concerned with professional football as a whole:

Professional football is a nationwide business structure essentially the same as baseball. *Professional football*

⁷Since the 1920's, we have experienced a proliferation and pervasive expansion of professional sports of nationwide character to include baseball, football, basketball, boxing, outdoor soccer, indoor soccer, golf, tennis, team tennis, bowling, track and field, auto racing, hydroplane racing, marathon running, triathlon competition, volleyball, ice hockey, racquetball, greyhound racing, horse racing, and more.

teams are dependent upon the league playing schedule for competitive players, just as baseball. The necessity of a *nationwide league structure* for the benefit of both teams and players for effective competition is evidence as is the need for a *national uniform* set of rules governing the league structure. Fragmentation of *the league* structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state anti-trust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state. (citation omitted) (emphasis added) Appendix 1, page 7.

We are satisfied that the national uniformity required in regulation of baseball and its reserve system is likewise required to the player team relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state anti-trust laws to those relationships. Appendix 1, page 7 (emphasis added).

Those facts and concerns were not before the court — the true facts were that only a handful of NFL players after the *Alexander* settlement remain in a position to challenge the rules carried out by the San Diego Chargers.

As this Court has consistently stated, hypothetical burdens or conflicts upon interstate commerce are not enough — actual conflicts or burdens are what control:

The existence of hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. See this court's opinion in *Rice v. Norman Williams Company*, — U.S. —, 102 S.Ct. 3294, 3299 (1982), which upheld California's restriction on importation and wholesaling of liquor to importer/wholesalers who were designated as authorized buyers by the distiller.

But, in this as in other areas of coincident federal and state regulation, the teaching of this court's decision . . . enjoins *seeking out conflicts between the state and federal regulation where none clearly exists* *The existence of such potential conflicts is entirely too speculative in the present posture* of this case to warrant preemption. . . . This sort of hypothetical conflict is not sufficient to warrant preemption. See *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 130-31 (1978), wherein this Court rejected the argument advanced by oil companies that the nationwide character of the industry prohibited state regulation.

Partee stands completely fooled by the California Supreme Court's double reverse — the majority's failure to apply *his facts* to the any number of commerce clause tests coupled with its having reached its decision based upon a broad hypothetical which can never come to pass. The need to avoid seeking out and resolving hypothetical burdens is ever increasing in today's marketplace whereby a great many businesses are no doubt engaged in interstate commerce. The fact that the San Diego Chargers participate in a nationwide enterprise is not enough. As the New Jersey Supreme Court has stated in *State v. Lawn King, Inc.*, 150 N.J. Super 204, 375 A.2d 295 (1977);

Defendants complain that this would compel them to be subjected to a hodgepodge of conflicting laws among these several states, as well as between federal and state laws within a single state. Perhaps so, but this is not unique. When General Motors manufactures a car, it must comply not only with federal law but the laws of each state within which it sells cars; so, too, the manufacture of children's garments regarding flame retardant specifications. And many others.

There are no precise guidelines to follow. We are dealing with matters of degree and emphasis, and precedent cannot divine the outcome. We are directed to imply 'a practical, case by case economic judgment' (citation omitted) to fashion a ruling for each set of facts. *U.S. v. Yellow Cab Company*, 332 U.S. 218, 231 (1947).

The San Diego Chargers, as a member and operator in the National Football League, are in practical effect no more uniform in structure nor national in scope than the automobile industry, the stock brokerage industry, the communications industry, the entertainment industry, the financial services industry or the business of nationwide retailers.⁸ The similarity in the substantive provisions of state and federal anti-trust laws means that, in all practicality, the San Diego Chargers, if in compliance with the federal anti-trust statute, will seldom, if ever, violate state anti-trust law. Inasmuch as professional football enjoys no congressional nor judicially created exemption from anti-trust laws, and as this Court only recently stated: "And it certainly is 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . .'" *Jefferson County Pharmaceutical Ass'n. v. Abbott Laboratories*, ___ U.S. ___, 103 S.Ct. 1011, 1023 (1983), the need for national uniformity alone will not suffice. Barring a showing of an *actual* burden upon interstate commerce by California's enforcement of its parallel anti-trust statute, the commerce clause would not preclude state regulation in this area.

⁸Moreover, as we as a nation move from an industrial society to an information society, more and more aspects of commerce will be uniform in structure and national in scope, so that computer literacy is employed to bring major aspects of the national economy directly into the home — "the electronic cottage." See J. Naisbitt, *Megatrends* (1982).

Conclusion.

Only last term this Court wrestled with the application of one of its 1927 decisions to 1983 facts and indicated quite properly that though the decision was not plainly wrong when decided, its application to current facts must be adjusted for the obvious change in conditions. *Arkansas Elec. Co-op Corp. v. Arkansas Public Com'n*, ___ U.S. ___, 103 S.Ct. 1905 (1983).

So, too, must adjustments be made when we deal with the application of the 1922 professional baseball exemption to modern professional sports. Far from the days when the incomparable Babe Ruth performed extraordinary feats for a modest salary and the principal means of communicating his achievements was the newspaper, today professional sports are a multi-trillion dollar business,⁹ involving millions of spectators annually, with untold millions more following by television, and a full range of subsidiary enterprises from "officially" licensed products to personal endorsements by the great, and not so great.

The application of the *Flood v. Kuhn* decision must be adjusted in light of these changed circumstances. When as staunch an advocate of concurrent enforcement of state anti-trust laws as Justice Stanley Mosk of the California Supreme Court¹⁰ feels compelled to follow *Flood v. Kuhn* down its

⁹In 1981, the receipts from paid admissions to spectator sports in the United States exceeded *two trillion* dollars, and that does not consider the subsidiary economic activity generated in terms of television revenues, endorsements, licensed products, concessions and the like. See U.S. Department of Commerce, *Bureau of the Census, Statistical Abstract of the United States*, 1982-83 at 236.

¹⁰More than 20 years ago when Justice Mosk was Attorney General of California, he strongly advocated concurrent enforcement of state anti-trust laws and found occasion to write:

In every case we have found, the right of a state to apply its antitrust laws to interstate commerce entering the state has been upheld.

Mosk, S., *State Antitrust Enforcement and Coordination With Federal Enforcement*, 21 A.B.A. Antitrust Section 358-369 (1962).

outdated and anachronistic path, it is time for this Court to do as it did in the *Arkansas Electric Co-op* case last term and “undertake an analysis grounded more solidly in [its] modern cases” (and modern realities). See 103 S.Ct. at 1917.

An analysis grounded in the modern cases of this Court and giving consideration to the modern realities of professional sports will not — as suggested by Justice Mosk — cast Dennis Partee to the same fate as Curt Flood. Rather, when the parallel nature of the Cartwright Act to the Sherman Act is properly considered and *actual* burdens on interstate commerce — rather than *hypothetical* ones — are properly balanced, the well-reasoned judgment of the California trial court will be found to be the appropriate result.

The judgment of the trial court should be affirmed.

Respectfully submitted,

GOEBEL & MONAGHAN,

By LOUIS E. GOEBEL,

BRIAN D. MONAGHAN,

JAMES E. RUBNITZ,

Attorneys for Petitioner.

In this case, Justice Mosk concurred “under compulsion of *Flood v. Kuhn*,” stating that he believed that the *Flood* decision “must be applied equally to professional football.” Appendix 1, dissenting opinion of Mosk, J., at page 10.

APPENDIX 1.

In the Supreme Court of the State of California.

Dennis Partee, Plaintiff and Respondent, v. San Diego Chargers Football Company, Defendant and Appellant. L.A. 31560 (Super. Ct. No. 391152).

Filed Aug. 29, 1983.

The San Diego Chargers Football Company, a California limited partnership, appeals a judgment awarding damages for violation of the California antitrust law. (Bus. & Prof. Code, § 16700 et seq., hereinafter the Cartwright Act.)¹ In accordance with other decisions considering the applicability of state antitrust laws to national professional sports leagues, we conclude that the Cartwright Act is not applicable to the interstate activities of professional football.

From 1968 to 1976, Dennis Partee, a California resident, played professional football as a punter and placekicker for the Chargers, a member of the National Football League (NFL). In 1974, the World Football League came into existence, and one of its teams offered Partee \$50,000 to play for it for a season. He subsequently entered into a contract with the chargers for three years with a salary of \$38,500 in 1974, \$44,000 in 1975, and \$49,500 in 1976. The agreement was subject to the terms and conditions of the standard NFL players contract. The trial court fixed damages for violation of the Cartwright Act based on the difference between the \$50,000 offer and the 1974 salary, awarded for the three years of the contract and trebled for a total award of \$103,500.

¹The judgment also awarded damages for breach of contract. On appeal, the Chargers did not challenge the part of the judgment awarding contract damages, and we dismissed the appeal insofar as it relates to that award.

In 1975, the last full year Partee played for the Chargers, the NFL had 26 teams located in 16 states and the District of Columbia. The league structure is characterized by a basic division into two conferences each having divisions composed of certain teams within the conference, and by play according to an ordered schedule between teams within the various divisions and the two conferences. The Chargers play nearly half their games outside of California, and most of their games are against teams located in other states. NFL games are regularly broadcast coast to coast over network television, and professional football has gained nationwide appeal.

To promote athletic competition by providing a means of keeping the teams on a par with each other and to foster the business success of the member teams, the NFL has certain operating rules, many of which are embodied in the NFL constitution and bylaws. Partee's antitrust action concerns five of these operating rules as they existed in 1974: the draft, option clause, Rozelle rule, tampering rule and one-man rule.² These rules are applied nationwide to all of

²The draft is a selection system whereby the respective NFL teams are awarded the initial rights to negotiate exclusively with football players graduating from college.

The option clause is a provision of the NFL Standard Player Contract which grants the team the right to renew a player's contract for one additional year if the team and player cannot agree to a new contract. After the option year expires, the player becomes a "free agent" and may negotiate and contract with teams of another league or with other NFL teams subject to the Rozelle rule.

The Rozelle rule is named after the NFL commissioner, Pete Rozelle. This rule provides if a free agent contracts with another NFL team, the new team must compensate the player's former team with draft choice(s) or other player contracts. If the new and former teams cannot agree as to the compensation, the commissioner arbitrates the matter and determines the compensation.

The tampering rule prohibits an NFL team from negotiating with a player currently under contract with another NFL team. Also, if one team has the exclusive right to negotiate with a player, no other team may tamper with that player.

The one-man rule refers to the commissioner's authority to compel a player to adhere to terms of an operative collective bargaining agreement between the players and the NFL teams.

the teams in the league. The court found all but the option clause to violate California antitrust laws.

Since 1968, all NFL players have been represented by the NFL Players Association (NFLPA). In 1970, the NFLPA and NFL management entered a second collective bargaining agreement covering the 1970 and 1973 seasons. No new agreement was reached until March 1977, but this agreement was made retroactive to the expiration date of the prior agreement. This new agreement, which was effective into 1982, contains each of the rules or practices challenged by Partee.³

The Chargers contend that professional football is a unique activity of interstate commerce which requires nationally uniform governance, that only federal antitrust laws apply, that interstate commerce would be unreasonably burdened if state antitrust laws were applied to professional football's interstate activities, and that application of the Cartwright Act was a violation of the commerce and supremacy clauses of the Constitution.

The Chargers do not claim federal antitrust laws, the Sherman and Clayton Acts, "occupy" the field of antitrust regulation, or that the federal and state antitrust laws so conflict as to require preemption of the state scheme. The federal and California antitrust laws, having identical objectives, are harmonious with each other. (See *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315.)

³This second collective bargaining agreement was negotiated during the pendency of antitrust suits brought by players against the NFL. The most significant case, *Alexander v. National Football League* (D.Minn. 1977) 1977-2 Trade Cases (CCH) ¶ 61,730, was a class action. The agreement and *Alexander* incorporate a settlement which includes the practices and rules Partee challenges. The settlement also contains a covenant not to sue (in antitrust) by the class members. However, Partee, who filed this suit before the specified cutoff date, chose not to be a class member. This agreement terminated in mid-1982.

The commerce clause is a limitation upon the power of the states without implementing legislation by Congress. (*Great Atlantic & Pacific Tea Co., Inc. v. Cottrell* (1976) 424 U.S. 366, 370-371.) "Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it 'regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" (*Edgar v. Mite Corp.* (1982) 102 S.Ct. 2629, 2640; *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 471; *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142.) The burden on interstate commerce will ordinarily be found unreasonable where the state regulation substantially impedes the free flow of commerce from state to state or governs "those phases of the national commerce which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority." (*Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 767.) The commerce clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited. (*Edgar v. Mite Corp.*, *supra*, 102 S.Ct. 2629, 2640-2641.)

It is settled that the NFL is engaged in interstate commerce and that federal antitrust laws are applicable. (*Radovich v. National Football League* (1957) 352 U.S. 445, 452.)

A number of cases have considered the applicability of state antitrust laws to national professional sports leagues. The leading case is *Flood v. Kuhn* (S.D.N.Y. 1970) 316 F.Supp. 271, affirmed (2d Cir. 1971) 443 F.2d 264, affirmed 407 U.S. 258. Considering baseball's reserve system, the trial court found state antitrust laws inapplicable on alternative grounds: preemption and unreasonable burden

on interstate commerce.⁴

Treating the applicability of state antitrust laws to professional baseball as a question of first impression, the Second Circuit affirmed. (*Flood v. Kuhn*, *supra*, 443 F.2d 264, 267-268.) The court stated: "[W]here the nature of the enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce." (*Id.*, at p. 267.)

Analyzing the organization of professional baseball and the effect of state antitrust regulation balanced against its need, the court of appeals reasoned: "Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severely fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would re-

⁴As considered by the trial court in *Flood v. Kuhn*, baseball's reserve system had many of the attributes of the NFL rules and practices of which Partee complains. Baseball's reserve system involved an agreement by all of the teams to be involved in a draft creating exclusive bargaining rights in the club as to the draftee; a uniform player's contract empowering the signing club unilaterally to renew a player's contract from year to year; denial of any right in a player, once signed, to negotiate with any other team; a prescribed number of players per team; and the unilateral right of a team to assign the contract to another team. (See *Flood v. Kuhn*, *supra*, 316 F.Supp. 271, 273-275.)

quire compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more far-reaching than that in *Southern Pacific Co. v. Arizona*, *supra*. On the other hand, we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the state's interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." (443 F.2d at pp. 267-268; fn. omitted.)

Affirming the circuit court, the United States Supreme Court stated: "The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of baseball and its reserve system.' 316 F.Supp., at 280. The Court of Appeals, in affirming, stated, '[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.' 443 F.2d at 268. As applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims." (407 U.S. at pp. 284-285, fn. omitted; see *State of Wisconsin v. Milwaukee Braves, Inc.* (Wis. 1966) 144 N.W.2d 1, 17-18; cert. den. 385 U.S. 990; reh'g. den. 385 U.S. 1044.)

Following *Flood v. Kuhn*, state antitrust regulation has been held inapplicable to professional basketball (*Robertson v. National Basketball Association* (S.D.N.Y. 1975) 389

F.Supp. 867, 88; *HMC Management v. New Orleans Basketball Club* (La.App. 1979) 375 So.2d 700, 706-707) and professional football (*Matuszak v. Houston Oilers, Inc.* (Tex.Civ.App. 1974) 515 S.W.2d 725, 728-729). No case has been found applying state antitrust laws to the interstate activities of professional sports.

Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent upon the league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state. (*Flood v. Kuhn, supra*, 443 F.2d at pp. 267-268.)

We are satisfied that national uniformity required in regulation of baseball and its reserve system is likewise required in the player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships.

Partee seeks to distinguish *Flood v. Kuhn*, on the ground that professional baseball enjoys a unique exemption from federal antitrust law (*Flood v. Kuhn, supra*, 407 U.S. 258, 269-284; *Toolson v. New York Yankees, Inc.* (1953) 346 U.S. 356; *Federal Baseball Club v. National League* (1922) 259 U.S. 200), and that the United States Supreme Court in upholding baseball's exemption from state law relied on the cases establishing baseball's federal exemption and stated that its holding applied to baseball. However, the high court

specifically relied upon the court of appeals' statement: " '[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's system, the Commerce Clause precludes the application of state antitrust law.' " The high court also relied upon the district court judge's statement that "national 'uniformity [is required] in a regulation of baseball and its reserve system.' " (407 U.S. at p. 284.) There is no justification to conclude that the United States Supreme Court did not fully consider the brief statements from the lower court opinions it chose to quote, approve, and rely upon. The statements are clear and unequivocal, and we are not free to disregard them. Because in all relevant respects the burden on interstate commerce and the state interest resulting from the player-team-league relationship in professional football attacked by Partee is substantially the equivalent of that resulting from the reserve clause in professional baseball, the statements are applicable to professional football.

Our conclusion that application of the Cartwright Act in the instant case would be in conflict with the commerce clause makes it unnecessary to consider the claim that application of the Cartwright Act would also be in conflict with federal labor law policy.⁵

⁵The dissent asserts that today's holding strikes a significant blow to the vitality of the Cartwright Act and that by this opinion "we would necessarily have to exempt all business engaged in multi-state activities." (Dis. opn. at pp. —, —.*) This opinion has a limited scope. The Cartwright Act remains vital. We do not mean to suggest that multi-state activities of other businesses may not be subject to state regulation upon due consideration of the commerce clause. Our holding is limited to the issue directly before us, the inapplicability of the Cartwright Act to professional football.

*Typed dissenting opinion at pages 6, 44.

The judgment is reversed insofar as it awards damages on the basis of violation of the Cartwright Act.

BROUSSARD, J.

WE CONCUR:

BIRD, C.J.

MOSK, J.

RICHARDSON, J.

KAUS, J.

**BYRNE, J.

**Assigned by the Chairperson of the Judicial Council.

Dennis Partee v. San Diego Chargers Football Company
L.A. 31560

Concurring Opinion by Mosk, J.

I have signed the majority opinion, under compulsion of *Flood v. Kuhn* (1972) 407 U.S. 258.

Though keenly aware of the need to vigilantly enforce the Cartwright Act, I cannot accept the unique theory of the dissent that professional baseball and professional football are governed by different law. Though the playing fields are of different configuration, the balls of a different shape, the equipment and uniforms of a varying appearance and the method of scoring inconsistent, both baseball and football are for all practical purposes identical coast to coast sporting ventures seeking a combination of glory and financial reward.

While I might not rhapsodize as effusively about baseball lore as did Justice Blackmun in *Flood* (supra, pp. 260-264), I am bound by the decision in that case and believe despite some dictum (*id.*, p. 283) that it must be applied equally to professional football. If a great outfielder like Curt Flood is barred by the United States Supreme Court from state anti-trust protection, an outstanding gridiron performer like Dennis Partee must suffer the same fate.

MOSK, J.

Dennis Partee v. San Diego Chargers Football Company
L.A. 31560

Dissenting Opinion by Reynoso, J.

Is the application of our state antitrust law (Bus. & Prof. Code, § 16700 et seq.; the Cartwright Act) to professional football precluded by the presence of interstate commerce and concurrent Sherman Act jurisdiction? I think not.

The Cartwright Act parallels and is in harmony with the Sherman Antitrust Act. A conflict would arise only if compliance with both federal and state regulations were impossible (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-143) or if state regulation stood as an obstacle to achievement of congressional objectives (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67). Nothing in the case before us even remotely suggests that application of the Cartwright Act conflicts with or is hostile to federal antitrust enforcement. To the contrary, federal courts have held the same National Football League (NFL) rules and practices challenged by Partee to be violative of the Sherman Act. Nor is there any interference with any congressionally declared, paramount national interest, notwithstanding the majority's implication that the league structure of professional sports entitles the individual team businesses to a state antitrust exemption not enjoyed by any other business engaged in interstate commerce.

As the majority correctly note, the doctrine of federal preemption under the supremacy clause¹ is not involved in this case, i.e., Congress has not occupied the field of antitrust regulation to the exclusion of the states. Our focus then is on the narrow issue of federal preclusion under the

¹(U.S. Const., art. VI, cl. 2.)

commerce clause.² The majority summarily conclude, without discussion, that application of the Cartwright Act to the NFL practices would virtually destroy "the player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships." (*Ante*, at p. —.) [Typed maj. opn. at p. 10.] But we are not told why this is so when the trial court has done nothing more than remove restraints on free trade which have already been held violative of the federal act.³ I respectfully suggest that the majority fail to explain why there is a potential for lack of uniformity and a consequent burden on interstate commerce because, in the present case, there can be *no* showing whatsoever that the application of the Cartwright Act to the challenged NFL practices will have *any* adverse effects on the free flow of commerce across state lines. In holding otherwise—contrary to the record before us—the majority ignore the unique and limited factual circumstances in which this case arises. The trial judge found that this case is one of only four cases remaining from a 1977 settlement of a

²"The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ." (U.S. Const., art. I, § 8, cl. 3.) The Supreme Court has explained: "The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods . . . or of persons who have been kidnapped. . . . Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft . . . or persons or things in commerce, as, for example, thefts from interstate shipments. . . . Third, those activities affecting commerce." (*Perez v. United States* 1971) 402 U.S. 146, 150.) We are here concerned with the third element of interstate commerce jurisdiction.

³"Consequently, it would be difficult to prove that a policy which removes privately instituted interferences, delays, interruptions, and inconveniences with interstate commerce, is itself a delay, interference, interruption, and inconvenience to interstate commerce when enforced at the local level by the States." (Flynn, *Federalism and State Antitrust Regulation* (1964) at p. 84.)

class action antitrust suit brought by NFL players against the league. Pursuant to the settlement agreement, the players covenanted not to sue; thus only players opting out of the settlement—e.g., Partee—can challenge the practices here in issue.

Thus, in the circumstances of this case, I cannot agree that application of state antitrust law will impose on interstate commerce an undue—indeed, any—burden which “ ‘is clearly excessive in relation to the putative local benefits.’ ” (*Ante*, at p. ____.) [Typed maj. opn. at p. 5.] This action, involving a California resident and a California corporation, arises under an employment contract expressly providing for the application of California law. The trial court, recognizing that antitrust regulation is an area of overlapping state and federal concern, correctly concluded the process is one of accommodation and that, in the present circumstances, application of state law is proper and preferable. Indeed, the state antitrust action was the only one available to Partee. A majority of this court have now left him with no remedy though the challenged practices manifestly violate state and federal antitrust laws.

The majority reverse the judgment in this case on the ground that “ ‘we are not free to disregard’ ” the Supreme Court’s holding in *Flood v. Kuhn* (1972) 407 U.S. 258. Finding *Flood* controlling, the majority think it unnecessary to decide whether state regulation of professional football actually conflicts with federal law or policy. As I shall explain, the *Flood* case, while binding on us, is in my view clearly distinguishable. I question the wisdom of deferring to a case which the high court candidly admits is an aberration in the law and a perpetuation of earlier, erroneously decided cases applicable only to professional baseball. More importantly, in *Flood*, state antitrust regulation would have inevitably resulted in conflict with federal law as baseball

has historically been granted an exemption from federal antitrust regulation. In other contexts, the Supreme Court has consistently held that the mere potential of conflict with federal law is insufficient to preempt state regulation. Most recently, the high court has held that California's statutory provisions for the storage and disposal of nuclear waste are not preempted by, and do not conflict with federal law, notwithstanding Congress' passage of the Nuclear Waste Policy Act of 1982. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission* (1983) — U.S. — [51 U.S.L. Week 4449].) I find it ironic that this court today holds that professional football—for which Congress has *not* declared a national uniform policy—is immune from state regulation.

The majority thus embrace the same dubious conclusion reached by the Court of Appeal below. Although we granted hearing to address this difficult federal preemption question—the resolution of which requires a delicate balancing of state and federal interests in this area of mutual concern—the majority simply conclude that we are presented with a nonissue as the result in this case is assertedly preordained by the Supreme Court's decision in *Flood*. My conclusion that this case is not controlled by *Flood* necessarily requires a more detailed analysis (and rejection) of the San Diego Chargers federal preclusion claim than that of the majority decision, which—I respectfully suggest—is rendered without apparent recognition of the significant blow dealt to the vitality of the Cartwright Act.

As I shall explain, the majority's holding represents a dramatic and abrupt departure from this court's previous teachings and uniform application of the Cartwright Act to activities affecting interstate commerce. I would not turn my back on sound precedent unless there is something unique about professional football which compels a marked devia-

tion from the normal course of our consistent holdings in this area. In my view, professional sports enterprises, despite our society's fascination with them, are no different, in any legally significant way, than any other business engaged in interstate commerce. Accordingly, I fear that today's decision comes dangerously close to eliminating concurrent state-federal antitrust enforcement as it may be read as relegating state jurisdiction to solely intrastate conduct and activities, a realm of competence already severely restricted by the vast expansion of federal interstate authority.

In short, the majority fail to reconcile principles of federalism with the reality of a national economy dominated by interstate commercial activity. My review of the case law in this area convinces me that our state's interest in regulating anticompetitive practices is paramount if the subject matter is not one which requires exclusive federal regulation in order to achieve uniformity vital to national interests. An extended discussion of the relevant decisional authority is necessary to show that the majority today fashion the unprecedented rule that a wholly speculative conflict between state and federal law, founded on mere supposition and inference unsupported by the factual record before us, is sufficient to compel a finding of federal preemption. This approach is completely at odds with, and seriously misapprehends the commerce clause preclusion doctrine carefully delineated in legion Supreme Court decisions. I would not follow this misguided path at the expense of our state's Cartwright Act. Instead, I would hold that, consistent with the commerce clause, the Cartwright Act may apply to activities which affect interstate commerce if, as in the present case, there is neither a conflict with federal law or policy nor imposition of a burden on interstate commerce. I therefore dissent.

This case arises in a limited factual setting.

Partee filed this action alleging inter alia, breach of contract in that the San Diego Chargers (Chargers) failed to pay his 1976 salary, and violation of the Cartwright Act in that the Chargers' adherence to various NFL rules and practices damaged his business and property interests. The antitrust action concerns five operating rules (contained in the NFL constitution and bylaws and incorporated by reference in the standard player contract) which, Partee alleged, imposed an unreasonable restraint on player transfer. Partee challenged these rules (the draft, option clause, Rozelle rule, tampering rule and one-man rule) as they existed in 1974.

These operating rules and practices have since been modified due in large part to several other actions against the NFL brought by players under federal antitrust laws. Three individual plaintiffs have prevailed on the merits of their challenge to these same rules. (*Smith v. Pro-Football* (D.D.C. 1976) 420 F.Supp. 738, revd. in part, affd. in part 593 F.2d 1173 (D.C. Cir. 1976); *Kapp v. NFL* (N.D. Cal. 1974) 390 F.Supp. 73, 586 F.2d 644, (9th Cir. 1978) cert. den. 441 U.S. 907; *Mackey v. NFL* (D.Minn. 1975) 407 F.Supp. 1000, affd. in part, revd. in part 543 F.2d 606, (8th Cir. 1976) petn. for cert. withdrawn (1977) 434 U.S. 801.) In *Kapp*, the district court granted summary judgment in favor of plaintiff, finding the draft, Rozelle rule, tampering rule and one man rule violative of the Sherman Act. The *Smith* court found the draft a "per se" restraint on trade; the circuit court affirmed on the "rule of reason" theory, but remanded for recomputation of damages. In *Mackey*, the circuit court affirmed a judgment that the Rozelle rule violated the Sherman Act; thereafter, the NFL's petition for writ of certiorari in the Supreme Court was withdrawn pursuant to the terms of a settlement agreement

in *Alexander v. NFL* (D.Minn. 1977) 1977-2 Trade Cases (CCH) ¶ 61,730.

Alexander was a class action brought on behalf of all NFL players, during the same period that NFL management was attempting to negotiate a collective bargaining agreement with the NFL Players Association (NFLPA). In March 1977, the NFL and NFLPA agreed to a comprehensive settlement which included the adoption of a new collective bargaining agreement which was made retroactive to the expiration date of the prior agreement in 1974. (This agreement expired in 1982.) The 1977 collective bargaining agreement sought to stimulate player mobility and remedy the lack of competitive bidding by, for example, modifying the Rozelle Rule, providing a team with a "right of first refusal" when a free agent negotiates with another team for his services, and requiring that compensation take the form of draft choices. (See, e.g., Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation* (1980) 28 U.C.L.A. L.Rev. 252.) Thus, the 1977 agreement substantially modified the rules and practices challenged by *Partee* and may have obviated most of the problems with unreasonable trade practices. (Of course, we are here concerned only with the NFL's rules and practices in effect in 1974 and need not consider whether the terms of the 1977, or for that matter the 1982, collective bargaining agreement are still so restrictive as to violate anti-trust laws, state or federal.)

The *Alexander* settlement also contained a covenant not to sue in antitrust by the class members. *Partee*, however, is not bound by the settlement agreement as he filed this action before the specified cut-off date and chose not to be

a class member.⁴ Thus, as earlier noted, he is one of a handful of players who is not precluded from challenging the NFL rules in force in 1974.

The present action proceeded to trial in 1979. After a nonjury trial, the court found in favor of Partee on the antitrust and breach of contract causes of action.⁵ As to the antitrust cause of action, the trial court found that "[t]he facts of this case present no undue burden upon interstate commerce, nor is there any preemption of the field by the Sherman Act or other federal statutes or the Constitution. . . ." Based on the evidence and, alternatively, on the doctrine of collateral estoppel (in reliance in *Smith, Kapp*, and *Mackey*), the court found that all of the challenged rules, with the exception of the option clause, constituted an unreasonable restraint of trade in violation of the Cartwright Act. The court assessed actual damages under the antitrust cause of action in the amount of \$34,500 (based on the difference between the World Football League offer and Partee's 1974 salary from the Chargers computed through 1976) and trebled that amount under the Cartwright Act for a total amount of \$103,500. Damages under the breach of contract cause of action were assessed in the amount of \$30,550.

The Chargers do not appeal from the breach of contract judgment as they assert claims of error only as to the antitrust

⁴Pursuant to federal rules of procedure for class actions, a notice was sent to all class members, including Partee, concerning the potential settlement. The settlement notice contained the following statement: "Neither the covenant not to sue, nor the dismissal with prejudice of this action shall prevent any member of the plaintiff class who duly commenced an individual action . . . in any Federal or State Court, prior to March 4, 1977, from pursuing such action to its lawful conclusion through trial and appeal." (Italics added.)

⁵The court found in favor of the Chargers on fraud and unpaid wages causes of action.

judgment. The Chargers contend that the trial court lacked jurisdiction to apply the Cartwright Act to the interstate activities of professional football.

The narrow issue before us involves federal preclusion under the commerce clause.

As the majority observe, the Chargers *do not* base their argument against state antitrust regulation of their business activities on the traditional preemption doctrine.⁶ The Chargers do not claim a violation of the supremacy clause. Nor can they do so. The contention that the Sherman Act (15 U.S.C. § 1 et seq.) occupies the field of antitrust (so that state regulation of the field is preempted as conflicting with the declared or presumed intent of Congress) was persuasively rejected in the well-reasoned Court of Appeal opinion *R.E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653.

The court in *Coors* noted that the legislative history of the Sherman Act unequivocally evidences a congressional intent to supplement, not preempt, state antitrust enforce-

⁶The traditional preemption doctrine focuses on congressional intent. Thus, state regulation is preempted if Congress expresses a clear intent to reserve a field exclusively within its jurisdiction (see, e.g., *Pennsylvania v. Nelson* (1956) 350 U.S. 497; *Charleston & W.C. Railway v. Varnville Furniture Co.* (1915) 237 U.S. 597) or if such an intent can be inferred in a field dominated by pervasive federal regulation (see, e.g., *Garner v. Teamsters Union* (1953) 346 U.S. 485; *Hines v. Davidowitz*, *supra*, 312 U.S. 52). Conversely, in the absence of congressional occupation of a field, a state may regulate the interstate aspects of an activity, even though the regulation has some effect on interstate commerce. (See, e.g., *Head v. New Mexico Board* (1936) 374 U.S. 424; *Huron Cement Co. v. Detroit* (1960) 362 U.S. 40.) However, even in this latter area, state laws which conflict with federal law may be preempted. (E.g., *California v. Zook* (1949) 336 U.S. 725; but see *Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117; *Parker v. Brown* (1943) 317 U.S. 341.)

ment.⁷ Moreover, because the Cartwright Act was patterned after the Sherman Act, both laws have identical objectives and are harmonious with each other (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315); thus, decisions under the latter act are applicable in construing the former (*Mailand v. Burckle* (1978) 20 Cal.3d 367). The adoption and incorporation of federal precedent effectively precludes the possibility of conflicts.⁸ In light of Supreme Court holdings that "mere coincidence" of state and federal regulation is not enough to preempt state law

⁷"The history of the Sherman Antitrust Act makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control unfair competitive practices. Before the enactment of the Sherman Act, some 21 states had legislation proscribing (combinations in restraint of trade.) Thus, it was not by accident that Congress did not use language in its act that would expressly preclude state regulation though the activity possessed interstate qualities. Senator Sherman, in urging enactment of his bill, stated: 'This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power *that they may cooperate with the state courts* in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States' (21 Cong. Rec. 2457 (1890).)" (*R.E. Spriggs Co. v. Coors*, *supra*, 37 Cal.App.3d at p. 660, original italics, fn. omitted.) Thus, the fact that federal antitrust enforcement has historically become the dominant force in the field does not in itself mean that state antitrust law is displaced or preempted by the Sherman Act which, as noted, was passed for the purpose of supplementing state antitrust enforcement by providing for more efficient regulation of anticompetitive interstate activities.

⁸Also relevant in this regard is the shared common law heritage of state and federal antitrust laws. (See Flynn, *Federalism and State Antitrust Regulation*, *supra*, at p. 90.) As this court stated in *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 44: "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. . . ." This policy is wholly in conformity with the purposes sought to be furthered by the Sherman Act. (See, e.g., *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1; *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469.)

(see, e.g., *California v. Zook*, *supra*, 336 U.S. at pp. 731-733), it cannot be seriously disputed, therefore, that state and federal laws may operate concurrently in the area of antitrust regulation. (See *Younger v. Jenson* (1980) 26 Cal.3d 397, 405 ["Obviously there is an overlap between coverages of the Sherman Act . . . and state antitrust laws that prohibit substantially the same conduct. . . ."]) Federal preemption, then, is applicable in this case, if at all, because of the operation of commerce clause limitations on this concurrent state jurisdiction.⁹

The Chargers make clear that their position is grounded on commerce clause principles. Particularly, they contend that state regulation through the Cartwright Act is precluded by the commerce clause because the structure of professional football is (1) "exclusively interstate commerce," and (2) "uniquely interstate commerce." The distinction set forth by the Chargers is not without significance. The former characterization—exclusivity—goes to the *impact* of the activity on the state: does it have a sufficient local consequence or nexus with the state? The latter—uniqueness—relates more properly to the *nature* of the activity: is it an activity requiring national uniformity, the regulation of which imposes a burden on interstate commerce?

The challenged activities in this case are not exclusively in interstate commerce.

It is axiomatic that where an activity is exclusively in interstate commerce without intrastate aspects, the commerce clause precludes state regulation or interference with that activity. (*R.E. Spriggs Co. v. Coors Co.*, *supra*, 37 Cal.App.3d at p. 657.) Of course, as a practical matter, all

⁹Although some courts have employed supremacy clause preemption and commerce clause preclusion terminology interchangeably, it is apparent that preclusion has been treated as a species of preemption.

interstate commerce has intrastate effects, as it begins in one state and ends in another. We are here concerned, however, with "exclusive" federal jurisdiction in the constitutional sense, i.e., the preclusion of state regulation of essentially interstate activity. The question, then, is whether the interstate activity has the requisite impact upon intrastate commerce to sanction state interference. It has been held that states may apply antitrust laws to interstate commerce only " 'when such commerce has significant local consequences.' " ¹⁰ (Baker v. Walter Reade Theatres, Inc. (1962) 37 Misc.2d 172, 173, 237 N.Y.S.2d 795.)

The Chargers assert that the employment practices challenged by Partee are solely interstate in character. It is emphasized that the challenged rules and practices were applied uniformly by all the teams in the NFL. Thus, the Chargers argue, Partee's antitrust injury was the product of nationwide conduct by all NFL teams. Yet, we are not here concerned with the uniform adherence to the challenged rules and practices by NFL teams in general; rather, we are concerned with the anticompetitive practices of one team, a California partnership, which caused injury to a California resident. Moreover, the rules which were found to be a restraint on trade were incorporated in a service contract which, by its terms, expressly provides for the application of California law. Manifestly, the activity in the present

¹⁰Conversely, the reach of federal antitrust jurisdiction into intrastate activity, while generally expansive, is also limited by the requirement that the impact of the local conduct on interstate commerce be more than incidental. (See, e.g., *Sun Valley Disposal Co. v. Silver State Disposal Co.* (9th Cir. 1969) 420 F.2d 341 [garbage collection]; *Kallen v. Nexus Corp.* (N.D. Ill. 1973) 353 F.Supp. 33 [bar review courses].) The boundaries in this area, however, are elusive. The courts have disagreed as to what type of activities are "essentially local" and thus not subject to federal intervention. (Compare *United States v. Yellow Cab Co.*, 332 U.S. 218, 230 with *Times-Picayune v. United States*, 345 U.S. 594, 602, fn. 11.)

case has both interstate and intrastate aspects.

I therefore conclude that the Chargers' conduct in this case does not present too remote or insubstantial a nexus with intrastate commerce so as to preclude state antitrust jurisdiction. (See *State v. Allied Chem. & Dye Corp.* (1960) 9 Wis.2d 290.)¹¹ I am not persuaded that this case involves exclusively interstate commerce and that this state has no legitimate local interest in its adjudication. Because the Cartwright Act is "within the tradition of 'the usual police' powers of the state," the state retains the right to protect its residents from trade restraints. (*Alfred M. Lewis Inc. v. Warehousemen Union* (1958) 163 Cal.App.2d 771, 790.) But may it do so when such restraints arise primarily from interstate activity? In other words, may state regulation affect all interstate activity which has a significant local impact? Although there is a dearth of authority in the area of antitrust, in other contexts the Supreme Court has consistently held, "[e]ver since *Willson v. Black-Bird Creek Co.*, 2 Pet. 245, and *Cooley v. Board of Wardens*, 12 How. 299" that the commerce clause "does not exclude all state power of regulation" and that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless . . . affect interstate commerce or even . . . regulate it." (*Southern Pacific Co. v. Arizona* (1944) 325 U.S. 761, 766-767.)

The Cartwright Act is applicable to interstate activities.

The anticompetitive activity in the present case—being both interstate and intrastate in character—is in the penumbral zone of the antitrust jurisdictional continuum, i.e.,

¹¹In *Allied Chemical, supra*, three out-of-state corporate defendants were charged with a price-fixing conspiracy under the Wisconsin antitrust law. Defendants had neither offices nor employees in the state; and prices were set nationwide. Nonetheless, the court found them within the purview of the Wisconsin law.

subject to overlapping state and federal authority. As I have explained, there is no supremacy clause bar to concurrent state jurisdiction in this area. The inquiry, then, is whether, given the requisite local nexus, the state is precluded by the commerce clause from affecting interstate commerce in its regulation of restraints on trade. The Chargers contend that no California case has upheld state regulation of interstate conduct comparable to the national practices here at issue, and that Cartwright Act enforcement has been limited to activities wholly within California. They further argue that prior cases deal only with supremacy clause preemption and not commerce clause preclusion.¹² The Chargers mischaracterize our case law. California cases have held, despite the lack of an unambiguous Supreme Court directive, that the state may, consistent with the commerce clause, regulate restraints on trade which affect interstate commerce.

This court has recently stated that "[n]either the Sherman Act nor the federal prohibition of undue burdens on interstate commerce . . . prevents [the Cartwright Act] from reaching transactions that have interstate aspects, but significantly affect state interests." (*Younger v. Jensen*, *supra*, 26 Cal.3d

¹²As previously noted, some cases do appear to discuss preclusion and preemption interchangeably. One example is *Alfred M. Lewis, Inc. v. Warehousemen*, *supra*, 163 Cal.App.2d 771, which involved an agreement to restrict competition. The trial court had determined that the agreement "would have been in violation of the Cartwright Act if it involved 'local businesses not engaged in interstate commerce,' but that because appellant [Lewis] was engaged in interstate commerce, the laws of the United States apply." (*Id.*, at p. 783.) Lewis was "engaged in interstate business, operating stores in many states." (*Id.*, at p. 775.) Thus, the issue of commerce clause preclusion was squarely raised. The Court of Appeal reversed, holding that the Sherman Act does not preempt the Cartwright Act since there is no conflict between the acts. The court also discussed commerce clause preclusion: it stated that, even assuming "that the activities in question are within the sphere of the commerce clause[,] . . . [t]he fact that Congress has acted to prevent restraints on trade in commerce, of itself, does not invalidate legislation by a state effecting the substantially same result." (*Id.*, at p. 788.)

397, 405; citing *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34; *R.E. Spriggs v. Coors Co.*, supra, 37 Cal.App.3d 653.) Although the issue in *Younger* concerned the authority of the Attorney General to investigate into the existence of antitrust violations, this court's statement regarding preclusion reaffirmed prior cases which have held that our state may regulate anticompetitive activities that affect interstate commerce. *Speegle* and *Coors* inescapably support the conclusion that Cartwright Act enforcement is not limited to wholly intrastate activities.

Coors involved a Cartwright Act action alleging antitrust violations in the California beer distribution system of an out-of-state brewer. Although the Court of Appeal was primarily confronted with a preemption challenge, it explicitly recognized that any holding against federal exclusivity would affect interstate commerce; accordingly, it proceeded to discuss commerce clause preclusion. While acknowledging that only *Coors'* California distribution scheme was being challenged, the court correctly noted that as this state's regulation of the distribution scheme "would clearly affect *Coors'* overall methods of distribution which are in interstate commerce, interstate commerce is both involved and affected." (37 Cal.App.3d at p. 658, fn. 4.) It had earlier observed that "[t]here is no question but that at all times relevant to this case, *Coors* was engaged in interstate commerce." (*Id.*, at p. 656.) After concluding that neither the supremacy clause nor the Sherman Act preempted the Cartwright Act, the court "turn[ed] to the question of whether the nature of the regulated subject *requires* federal preeminence." (*Id.*, at p. 660, original italics.) The court answered this question in the negative by employing the balancing approach enunciated in *California v. Zook*, supra, 336 U.S. 725. "The approach has been to reconcile the relevant state and federal interests and to find that the states have a valid interest in

regulating unfair competitive practices within their jurisdictions, and *that this power is not lost merely because the activity affects interstate commerce.*" (*Id.*, at p. 663, italics added.) Earlier, the *Coors* opinion has observed that there was no undue burden on interstate commerce "in that the Cartwright Act, . . . is complementary to the relevant provisions of the federal statutes and may be justified as a reasonable means of protecting a significant state interest, i.e., prevention of unfair competition." (*Id.*, at p. 659.)

Of significance is the *Coors* court's recognition that finding state preclusion whenever interstate commerce is involved would effectively destroy most state antitrust enforcement since, in light of the vastly increased domain of federal commerce clause authority, states would be relegated to a severely restricted realm of intrastate commerce. With the demise of the mechanical "dual sovereignty" theory and the development of expansive federal power over activities merely "affecting" interstate commerce (see, e.g., *Manderville Island Farms, Inc. v. American Crystal Sugar Co.* (1948) 334 U.S. 219; *United States v. Frankfort Distilleries, Inc.* (1945) 324 U.S. 293, 298 ["Congress in passing the Sherman Act, left no area of its constitutional power unoccupied"]), the regulatory power of the national government has become so broad that, if fully exercised, virtually all intrastate activity might be regulated to the complete exclusion of state authority (see, e.g., *Perez v. United States* (1971) 402 U.S. 146 [loan sharking]; *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241 [public accommodations]). Recognizing the potential for "nullification of much state effort in the antitrust field [.]" the Court of Appeal aptly observed: "If the state regulations were to lose effectiveness as soon as interstate commerce is affected, a large policing area would be excluded, and the states would become helpless to protect [their] cit-

izens, though no national benefit would accrue. (*Commonwealth v. McHugh*, 326 Mass. 249 [93 N.E.2d 751, 761-764].) Exclusion would necessarily result whenever the subject activity 'substantially affects' interstate commerce."¹³ (37 Cal.App.3d at p. 660; citing *Burke v. Ford*, 389 U.S. 320.) Similarly, a federal court has recently noted that "[d]espite the broad reach of the federal commerce power, state antitrust laws retain vitality in dealing with matters which, while having interstate aspects, significantly affect local interests." (*Salveson v. Western States Bankcard Ass'n.* (N.D. Cal. 1981) 525 F.Supp. 556, 573-574.)

An earlier decision by this court, *Speegle v. Board of Fire Underwriters*, supra, 29 Cal.2d 34, further supports the view that the state is not precluded from regulating interstate activity once a local nexus is established. The issue before this court was whether the application of the Cartwright Act to the insurance business was precluded in light of a then-recent Supreme Court decision holding that insurance transactions were interstate commerce. (*United States v. South-Eastern Underwriters' Ass'n.* (1944) 322 U.S. 533.) For three-quarters of a century prior to *South-Eastern*, insurance had been regulated by the states, as this business had been held not to constitute interstate commerce. (*Paul v. Virginia*

¹³ *McHugh*, the Massachusetts case cited by the Court of Appeal, makes the following pertinent observations in arguing against a restricted role for state antitrust regulation: "Monopolies and restraints of trade are of infinite form and variety. . . . Some expend their efforts almost wholly upon intrastate commerce and are of only local interest and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations in between. In many cases it would be very difficult to draw the line. If state laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years." (326 Mass. at p. 265.)

(1869) 75 U.S. (8. Wall.) 168.) However, the Supreme Court strongly suggested that the redefinition of insurance as interstate activity did not necessarily deprive state courts of jurisdiction to regulate this business,¹⁴ and, accordingly, the court set forth a balancing test to decide the preclusion question: “. . . [T]he primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid. . . .” (*South-Eastern*, supra, at p. 562.)

Relying on the above-quoted language, this court held in *Speegle* that since there is no conflict between the Cartwright Act and the Sherman Act, state law applies “even if interstate commerce is involved.” (29 Cal.2d at p. 51.) *Speegle* stated: “State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.” (*Id.*, at p. 50.) (The *Speegle* court, however, omitted mention of the additional limitation—enunciated in Supreme Court cases dealing with state regulations outside the antitrust context—that the state may not impose an undue burden on interstate commerce—see, e.g., *Pike v. Bruce*

¹⁴The final paragraph of the opinion states: “The argument that the Sherman Act necessarily invalidates many state laws regulating in insurance we regard as greatly exaggerated.” (322 U.S. at p. 562.) In response to *South-Eastern*, Congress enacted the McCarran-Ferguson Act which provides that federal law is only “applicable to the business of insurance to the extent that such business is not regulated by state law.” ((1945) 59 Stat. 33, 15 U.S.C. §§ 1011, 1012.)

Church Inc. (1970) 397 U.S. 137, 142; *Bibb v. Navajo Freight Lines, Inc.* (1959) 359 U.S. 520.)

The foregoing demonstrates that the courts of this state have held, consistent with Supreme Court authority,¹⁵ that the state may regulate interstate anticompetitive activity subject to certain limitations. These limitations may be summarized as a three-part test of commerce clause preclusion: states may regulate interstate activity unless (1) the activity is exclusively in interstate commerce without intrastate aspects or a local nexus (*Coors*, supra, 37 Cal.App.3d 653); or (2) regulation of the activity imposes an undue burden upon or discriminates against interstate commerce (*Bruce Church*, supra, 397 U.S. 137; *Bibb*, supra, 359 U.S. 520);

¹⁵While *Speegle* relied on an antitrust case (*South-Eastern*, supra), *Coors* necessarily relied on commerce clause decisions outside the field of antitrust because the Supreme Court, to my knowledge, has never specifically addressed itself to the question of the outer limit of state antitrust regulation of interstate commerce. Nevertheless, in every case I have found that raised the question factually, the high court has expressed a willingness to defer to state regulation. (See *Waters-Pierce Oil Co. v. Texas* (1909) 212 U.S. 86; *Standard Oil v. Tennessee* (1910) 217 U.S. 413; *Straus v. American Publishers' Ass'n.* (1913) 231 U.S. 222; cf. *Gibbs v. Buick* (1939) 307 U.S. 66, 83 [Black, J., dis.]; see also *United States v. South-Eastern Underwriters Ass'n.*, supra, 322 U.S. 533.) The early cases are of limited precedential value, however, since they only implicitly approved the application of state antitrust law, and also because these decisions were rendered in the era of strict adherence to the mechanical intrastate-interstate view of the commerce clause. It appears that in these early cases the court perceived the activity in question as purely intrastate in nature. As an example, see *Standard Oil's* rejection of a contention that the Tennessee antitrust law constituted "an unreasonable constitutional interference with commerce along the States." (217 U.S. at p. 419.) Justice Holmes responded: "The mere fact that [the Tennessee act] may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling goods from another state. How far Congress could deal with such cases we need not consider, but certainly *there is nothing in the present state of law at least that excludes the States from a familiar exercise of their power.*" (*Id.*, at p. 422, italics added.)

or (3) regulation of the activity conflicts with federal law or policy (*Speegle*, *supra*, 29 Cal.2d 34; *South-Eastern*, *supra*, 322 U.S. 533).¹⁶

I have thus far concluded that the anticompetitive conduct before us has significant intrastate aspects and is not exclusively in interstate commerce, and that the state may, consistent with the commerce clause, regulate restraints on trade which affect interstate conduct. The remaining inquiries focus on the second and third part of the test, and specifically, on the central issue before us in this case; whether state regulation of professional football burdens interstate commerce or conflicts with federal law or policy. We must "undertake[] a balancing approach in resolving these issues." (*Pike v. Bruce Church, Inc.* (1969) 397 U.S. 137, 142; see also *Huron Cement Co. v. Detroit*, *supra*, 362 U.S. 440; *Southern Pacific Co. v. Arizona*, *supra*, 325 U.S. 761.) the majority, however, do not engage in the impartial balancing of conflicting interests mandated in a host of Supreme Court decisions; instead they accept the Chargers' contention that Supreme Court authority compels this court to hold that state regulation of all professional sports is prohibited by the commerce clause.

Flood v. Kuhn does not control this case.

The Chargers, relying on *Flood v. Kuhn* (S.D.N.Y. 1970) 316 F.Supp. 271, affirmed (2d Cir. 1971) 443 F.2d 264, affirmed (1972) 407 U.S. 258—a baseball case—contend

¹⁶ I note that commentators are "overwhelmingly supportive of the extension of state antitrust regulation to include conduct and practices that, while possessing a local nexus, nonetheless 'affect' or are 'in' interstate commerce." (Rubin, *Rethinking State Antitrust Enforcement* (1974) 26 U.Fla.L.Rev. 653, 669; see also Flynn, *Federalism and State Antitrust Regulation*, *supra*, at pp. 56-108; Mosk, *State Antitrust Enforcement* (1962) 21 A.B.A.J. 358; Note, *The Commerce Clause and State Antitrust Enforcement* (1961) 61 Colum. L.Rev. 1469.)

that because professional sports require national uniformity in their regulation, they can only be regulated, if at all, under the Sherman Act. The majority agree with the Chargers that we are precluded from applying the balancing Court's decision in *Flood*. As earlier noted, I conclude that the Supreme Court's cursory holding in *Flood* with respect to state antitrust preclusion is limited to baseball—"a derelict in the stream of the law." (*Flood, supra*, 407 U.S. at p. 286 [Douglas, J., dis.].) While a few lower courts, state and federal, have considered this difficult question, there is to my knowledge no Supreme court opinion which sets forth guidelines as to the exact parameters of state antitrust regulation of interstate commerce. (See fn. 15, *ante*.) Finding no certain precedent to guide us, I would employ the balancing test enunciated in cases involving the interface of commerce clause requirements within other areas of state regulation.

In *Flood*, a baseball player challenged professional baseball's reserve system as violative of the Sherman Act and New York's antitrust law. The *Flood* litigation, however, was principally an assault on baseball's long-standing exemption from antitrust laws. In 1922, Justice Holmes, speaking for a unanimous court, ruled that baseball exhibitions were purely state affairs (to which the interstate transportation of players were merely incidental) and were not "trade or commerce in the commonly accepted use of those words" and hence "were not interference with commerce among the States." (*Federal Baseball Club v. National League* (1922) 259 U.S. 200, 209.) Over the years, baseball was able to withstand intermittent antitrust attacks on the authority of *Federal Baseball*. The baseball exemption question again reached the Supreme Court in 1953, at a time when that court's decisions had greatly expanded federal commerce clause authority. In *Toolson v. New York*

Yankees (1953) 346 U.S. 78, the court, with two justices dissenting, declined to reconsider *Federal Baseball* despite the considerable change during the intervening thirty years in the definition of "interstate commerce." the court referred to four reasons for its holding: (1) Congressional awareness of and inaction with respect to *Federal Baseball*; (2) baseball's development on the understanding that it was not subject to existing federal antitrust laws; (3) a reluctance to overrule *Federal Baseball* with a consequent retroactive effect; and (4) a professed desire that any remedy be supplied by Congress rather than by court decision. (346 U.S. at p. 357.)

Four years after *Toolson*, the Supreme Court limited the exemption to the sport of baseball, and held that antitrust laws were applicable to professional football and its practices. (*Radovich v. National Football League* (1957) 352 U.S. 445.) Other decisions made it clear that *Toolson* applied only to baseball and that no other sport enjoyed exemption from the antitrust laws.¹⁷ (See, e.g., *United States v. International Boxing Club* (1955) 348 U.S. 236; *Haywood v. National Basketball Association* (1971) 401 U.S. 1204.)

Faced with this history, it is not surprising that Flood was not to prevail in his federal antitrust claim. The district court considered itself bound by the rule of stare decisis, stating

¹⁷The lower courts accepted this inconsistent result, but they did so reluctantly. One circuit court stated: "We freely acknowledge our belief that *Federal Baseball* was not one of Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' [Citation.] . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions. . . ." (*Salerno v. American League* (2d Cir. 1970) 429 F.2d 1003, quoting *Radovich v. National Football League*, supra, 352 U.S. at p. 452.)

that "decisions of the Supreme Court are not lightly overruled, . . ." (*Flood*, supra), 316 F.Supp. at p. 271.) Further, the court held that in light of baseball's exemption from federal antitrust laws, state antitrust regulation would violate the supremacy and commerce clauses. The circuit court affirmed. However, it considered the state law claim a "question of first impression, . . . whether application of state antitrust law to professional baseball is barred by a federal pre-emption of the field under the Commerce Clause." (*Flood*, supra), 443 F.2d at p. 267.) Citing *Southern Pacific Co. v. Arizona*, supra, 325 U.S. 761, 774-775, the court of appeals said: "[W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce." (*Ibid.*) It thus held that the commerce clause precluded state regulation of baseball.

On petition for certiorari, the Supreme Court principally considered the baseball exemption question. Justice Blackmun's opinion conceded that the baseball exemption was aberrant in view of the court's failure to similarly exempt other sports: "[B]aseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball. Even though others might regard this as 'unrealistic, inconsistent, or illogical,' see *Radovich*, [supra], the aberration is an established one, and . . . is an aberration that has been with us now for half a century, . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and

not by this Court.” (407 U.S. at pp. 282-284.) The court therefore concluded that Congress, “by its positive inaction,” had sanctioned this anomaly and had “clearly evinced a desire” to keep baseball unregulated by federal antitrust laws. (*Id.*, at pp. 283-284.)

The court then disposed of the state antitrust issue in a terse concluding paragraph: “The petitioner’s argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national ‘uniformity [is required] in any regulation of baseball and its reserve system’ 316 F.Supp., at 280. The Court of Appeals, in affirming, stated, ‘[A]s the burden on interstate commerce outweighs the states’ interests in regulating baseball’s reserve system, the Commerce Clause precludes the application here of state antitrust law’ 443 F.2d, at p. 268. *As applied to organized baseball*, and in the light of this Court’s observation and holdings in *Federal Baseball* and *Toolson*, in [*United States v.*] *Shubert* [(1955) 348 U.S. 222], in *International Boxing*, and in *Radovich*, and despite baseball’s allegedly inconsistent position taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims.” (407 U.S. at pp. 284-285, fn. omitted, italics added.)

While it is unfortunate that the Court did not find it necessary to explain its reasons for affirming, the brief paragraph is nonetheless a constitutional holding rejecting Flood’s alternate contention. Accordingly, we are bound by it. The court makes clear, however, that it agreed with the judgment below “[a]s applied to . . . baseball” As the New Mexico Supreme Court recently noted in rejecting a contention that *Flood* mandates preclusion of state antitrust laws: “In affirming the lower courts’ decisions, the Supreme Court did not adopt any broad or rigid limitations on the

applicability of state antitrust laws to transactions involving interstate commerce. The Court upheld those holdings '[a]s applied to organized baseball, and in light of this Court's holdings in *Federal Baseball* [and] *Toolson*. . . ' (United Nuclear Corp. v. General Atomic Co. (N.M. 198) 629 P.2d 231, 273, quoting *Flood*, *supra*, 407 U.S. at p. 284.)

The Chargers argue that we can infer from the citation to *Radovich*, a football case, that the court intended its holding to apply to football as well. *Radovich*, however, held only that *Toolson* is specifically limited to baseball and that "the volume of interstate business involved in organized professional football places it within the provisions of the [Clayton] Act." (352 U.S. at p. 452.) As I have explained, the mere fact that a defendant is engaged in interstate activities does not preclude application of state antitrust laws. More likely, the court cited *Radovich* and the other sports cases to emphasize the unique and anomalous treatment afforded baseball. While I agree with the majority that the organizational structure of football is factually indistinguishable from that of baseball, the long-standing, aberrant exemption provided baseball makes this case readily distinguishable from *Flood*.

The unique character of the baseball exemption provides a clear explanation for the Supreme Court's affirmance of the district court's supremacy rationale for preempting state regulation of baseball. Having concluded that the "positive inaction" of Congress serves to exempt baseball from federal antitrust regulation (407 U.S. at p. 283), the court found it necessary to imply federal preemption of state antitrust enforcement as well. (See *Bay Guardian Co. v. Chronicle Publishing Co.* (N.D. Cal. 1972) 344 F.Supp. 1155, 1160 [statutory exemption for joint operating agreements preempts state antitrust law].) Indeed, "the time honored, though unusual, exemption from federal antitrust laws which

professional baseball enjoys would be meaningless if state antitrust laws were not also inapplicable.” (*United Nuclear Corp.*, 629 P.2d, at p. 273.) Thus, in *Flood* there was a clear conflict since the application of state antitrust laws would produce a result inconsistent with the congressional intent that baseball be unregulated.

The Supreme Court’s alternate holding¹⁸ in *Flood*—affirming the circuit court’s burden-on-commerce holding—also appears to be grounded on baseball’s unique exemption, again, as suggested by the citation to *Federal Baseball and Toolson*. The high court specifically approved the view of the circuit court that “the burden on interstate commerce outweighs the states’ interests in regulating baseball’s reserve system, . . .” (407 U.S. at p. 284; quoting 443 F.2d at p. 268.) The circuit court, relying on *Southern Pacific v. Arizona*, *supra*, had reasoned that “if state regulation were permissible, the internal structure of the [baseball] leagues would require compliance with the strictest state antitrust standard.” (443 F.2d at p. 267.)

The Chargers place heavy reliance on *Southern Pacific*, a case in which the Supreme Court precluded application of an Arizona law requiring a change in the length of trains at the state line. The trial court had found that “the Arizona

¹⁸I note that the preemption holding alone is sufficient to dispose of the *Flood* case. If state antitrust regulation is completely preempted by the supremacy clause there is no need to weigh the state’s interest in regulating the activity against the burden imposed upon interstate commerce. Under a commerce clause analysis, state interference is presumed valid unless it unduly burdens commerce; therefore, such analysis must be preceded by a judicial determination (or litigant’s concession) that state law is *not* preempted by the supremacy clause. In *Flood*, the circuit court did not discuss supremacy clause preemption, nor did it comment on the district court’s preemption holding. It might be argued, therefore, that the high court’s affirmation of the district court rendered the circuit court’s commerce-clause-preclusion holding dictum, or that the court’s affirmation of the circuit court is itself dictum.

Law had no reasonable relation to safety, . . .” (325 U.S. at 761.) Balanced against this, the court held that the “Arizona Train Limit Law imposes a serious burden on interstate commerce, . . . [as] [i]t materially impedes the movement of appellant’s interstate trains through that state and interposes substantial obstruction to the *national policy proclaimed by Congress*, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding § 1, 54 Stat. 899.” (*Id.*, at p. 773, italics added.)

It seems evident that the circuit court in *Flood* quite properly relied on *Southern Pacific* because, as in the case of train regulation, there is, according to the Supreme Court, a “national policy” as to baseball. With respect to railroads and other interstate transportation, the needs of the subject matter clearly call for national uniformity. (See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.* (1969) 394; *Bibb v. Navajo Freight Lines, Inc.*, *supra*, 359 U.S. 520.) Similarly, professional baseball is entitled to uniform treatment as Congress has “clearly evinced a desire” for a policy of self-regulation and complete antitrust exemption for this particular sport. (*Flood, supra*, 407 U.S. at p. 284.) State regulation of baseball would result in inherent conflict because states, unguided by federal antitrust precedent, would subject baseball to antitrust laws of varying strictness in violation of the commerce clause.

While the impact of diverse state regulation is unquestionable as to baseball, professional football, by marked contrast, can claim only a potential conflict in the absence of a corresponding “national policy” precluding federal antitrust regulation. Unlike baseball, football cannot claim a national policy supporting self-regulation. Nor is football “a subject demanding exclusive federal regulation in order

to achieve uniformity vital to national interests."¹⁹ (Florida Avocado Growers v. Paul, *supra*, 373 U.S. 132, 144; see and compare *Southern Pacific*, *supra*, 325 U.S. 761, and *Navajo Freight Lines*, *supra*, 359 U.S. 520 with *Pacific Gas & Elec.*, *supra*, — U.S. —, and *United Nuclear*, *supra*, 629 P.2d 231, 272 [uranium industry not "vital to military posture of United States" and subject to state antitrust laws].) Nor has Congress manifested the intent, express or implied, to exempt football from federal antitrust regulation so as to preclude divergent state enforcement.²⁰ To the contrary, the fact that football is subject to federal antitrust laws greatly reduces the potential for diverse treatment by states, like California, which have patterned their antitrust laws after the Sherman Act and have adopted federal precedent as their own. In fact, as I shall explain, the trial court judgment in the present case is consistent with federal authority holding the same rules and practices challenged here violative of the Sherman Act.

In sum, *Flood* and *Southern Pacific* are inapposite. The Chargers would have us assume a conflict between state and federal antitrust policies without assessing and weighing the perceived detrimental impact of state regulation on professional football against this state's strong interest in enforcing its antitrust laws. Although the mere potential of

¹⁹The Supreme Court has sustained preemption challenges against state law in most cases where the "national interest" implicated is in the area of national security or labor policy, neither of which is in issue here. (See, e.g., *Hines v. Davidowitz*, *supra*, 312 U.S. 52; *Pennsylvania v. Nelson* (1956) 350 U.S. 497; *Garner v. Teamsters Local 776* (1955) 436 U.S. 485; *Hill v. Florida ex rel. Watson* (1945) 325 U.S. 538.)

²⁰Chief Justice Stone's statement in *Parker v. Brown*, *supra*, 317 U.S. at p. 351, is particularly apt in this regard: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's [regulatory scheme] is not lightly to be attributed to Congress."

conflicting state regulation was held sufficient to impermissibly burden baseball by forcing it to conform to "the strictest state antitrust standard" (*Flood*, *supra*, 443 F.2d at p. 268), I interpret the *Flood* cases as limited to professional baseball because of their focus on the unique historic development of that sport.²¹ Baseball is, to use the Supreme

²¹I recognize of course that state and federal lower courts have held state antitrust laws inapplicable to various professional sports. (See *State v. Milwaukee Braves, Inc.* (1966) 31 Wis.2d 699, 719-732, cert. den. (1966) 385 U.S. 990; *Matuszak v. Houston Oilers* (Tex.Civ.App. 1974) 515 S.W.2d 725; *Robertson v. National Basketball Association* (S.D.N.Y. 1975) 389 F.Supp. 867, 880-881; *HMC Management v. New Orleans Basketball Club* (La.App. 1979) 375 So.2d 700, 706, cert. den. (La. 1980) 379 So.2d 11.) These authorities, however, are not controlling.

In *Milwaukee Braves*, a pre-*Flood* case, Wisconsin brought an action against 10 baseball teams alleging that the league's decision to move the Braves' franchise to Atlanta violated its state antitrust law. In holding state law inapplicable, the majority opinion obliquely stated that "some members" of the court believed state law was preempted under the supremacy clause while "other members" preferred a commerce clause rationale. In either event, the court makes clear that its decision was grounded on baseball's unique "history of judicial action and legislative inaction" and the resulting "conflict between state and federal policy." (31 Wis.2d at p. 721.) Moreover, "transfer of a team franchise is certainly distinguishable (particularly with regard to the likelihood of state discrimination in favor of its own economic interests) from restraints imposed . . . upon players' freedom to negotiate, . . ." (*Flood*, *supra*, 316 F. Supp. 271, 279.)

Similarly, *HMC Management* involved an attempt to keep the "Jazz" basketball team from moving from New Orleans. Relying on *Flood*, the court held on preemption grounds that "most of the violations that are alleged cannot be subject to the Louisiana Anti-Trust Laws." (375 So.2d at p. 706.) The court held, however, that the alleged violation of a lease, if proven to be the result of anticompetitive conspiracy, would be subject to the state law. (*Id.*, at p. 707.) As I have explained, though, this court cannot, absent an unambiguous Supreme Court directive to the contrary, limit our state antitrust law to purely intrastate activities.

In *Matuszak*, a football case, the Texas court simply quoted the circuit court's opinion in *Flood* and concluded, on "federal pre-emption" grounds and without analysis, that the circuit court's "holding is applicable to the instant case . . . [t]herefore, the question of whether *Matuszak's* contract violates federal law is a question for the Federal Courts." (515 S.W.2d at pp. 728-729.)

Finally, in *Robertson* a federal district court found "the opinion of

Court's own adjectives, "an exception and an anomaly." (*Flood, supra*, 407 U.S. at p. 283.) I am not persuaded that this "aberration" (*ibid*) should be extended to another professional sport. As in *Radovich*, the Chargers and amicus NFL seek refuge under a protective umbrella provided only to baseball. However, because football enjoys no congressional or judicially created exemption from antitrust laws, its asserted need for uniformity must be based, not on a national policy precluding state regulation, but, rather, only on the nature of its interstate operations. I would therefore balance this asserted need for uniformity against this state's interest in enforcing its antitrust laws in order to determine whether, "under the circumstances of [this] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes of Congress." (*Hines v. Davidowitz, supra*, 312 U.S. 52, 67.)

Under the facts of this case, state antitrust regulation of football neither burdens interstate commerce nor conflicts with federal law or policy.

In cases where there is no express or implied national policy with respect to a particular business enterprise, the Supreme Court has phrased the "general rule" for determining the validity of state regulation affecting interstate

the Court of Appeals [in *Flood*] unquestionably applicable and controlling." (389 F.Supp. at p. 880.) The court held state antitrust regulation inapplicable to professional basketball because that sport is in the "same business" as baseball, involving "substantial volumes of interstate . . . commerce." (*Id.*, at p. 881.)

To the extent that *HMC Management*, *Matuszak* and *Robertson* held (either without analysis or in reliance on the virtually identical league structures and interstate nature of professional sports) that state antitrust law is preempted or precluded, we should decline to follow these cases. In my view we should not decide the instant case on the basis of the organizational similarities between professional football and baseball; rather, we should focus on the aberrant treatment historically accorded the latter sport.

commerce as follows: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues [citation], but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. [Citation.]" (Pike v. Bruce Church, Inc., *supra*, 397 U.S. 137, 142; see also Hughes v. Oklahoma (1979) 441 U.S. 322, 336.) In applying this mode of analysis, I bear in mind that federal antitrust laws are applicable to professional football (*Radovich, supra*, at p. 452), and that federal decisions under the Sherman Act are applicable in state antitrust cases brought under the Cartwright Act (*Mailand v. Burkle, supra*, 20 Cal.3d 367, 373).

With respect to the requirement that the state law regulate "even-handedly," it is the rule that the burden to show discrimination rests on the party challenging the state regulation. (*Hughes v. Oklahoma, supra*, at p. 336.) This question needs no extended discussion as the Chargers do not contend the Cartwright Act discriminates between interstate and intrastate commerce. Clearly, this state's antitrust law is nondiscriminating. Because the Cartwright Act applies both to interstate and intrastate commerce, "the controlling question is whether the incidental burden imposed on interstate commerce by [the state] is 'clearly excessive in relation to the putative local benefits.'" (Minnesota v. Clo-

ver Leaf Creamery Co. (1981) 449 U.S. 456, 472, quoting from *Pike v. Bruce Church*, *supra*, 397 U.S. 137, 142.) Though this is the central question before us, the majority do not balance California's interest in preventing unfair trade practices within its borders against the asserted burden on professional football's interstate operations and its need for nationally uniform antitrust regulation.

It is not open to dispute that California has a legitimate interest in protecting its citizens against unfair trade practices. Regulations which effectuate a legitimate public interest—here antitrust regulation under the Cartwright Act—are within the state's inherent police powers. (*Alfred M. Lewis, Inc. v. Warehousemen Union*, *supra*, 163 Cal.App.2d 771, 790.) It has been consistently held that "the prevention of anti-competitive, monopolistic and predatory trade practices . . . is a legitimate exercise of the state's inherent police power." (*United Nuclear*, *supra*, 629 P.2d at p. 270; citing *Giboney v. Empire Storage Co.* (1949) 336 U.S. 490.)

The Chargers contend, though, that the state interest is outweighed because professional football is a unique activity of interstate commerce which requires nationally uniform governance. The Chargers argue that the nationwide character of the NFL league structure and operating practices prohibits the application of state antitrust laws.

The Supreme Court has rejected a similar argument, advanced by oil companies, that the nationwide character of the industry prohibited state regulation. The court stated: "[W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this

concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing. . . . [T]his Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area." (*Exxon Corp. v. Governor of Maryland*, *supra*, 437 U.S. 117, 128-129.)

The *Exxon* analysis applies with equal force here. If we were to insulate football from this state's antitrust laws on the basis of its "national character," we would necessarily have to exempt all businesses engaged in multi-state activities. The Chargers' arguments, carried to their logical extension, would severely restrict the applicability of the Cartwright Act since a large segment of this nation's businesses would be immunized from state antitrust regulation as soon as their activities became "national" in scope. Thus, "a very large area will be fenced off in which the states will be practically helpless to protect their citizens. . . ." (*Commonwealth v. McHugh*, *supra*, 326 Mass. 249, 265.)

The majority apparently accept the Chargers' argument that professional football is unique in that the league structure imposes a "necessary interdependence" among the teams, each of which is required to function pursuant to a uniform set of national rules. Thus, the Chargers argue, subjecting California teams to differing standards would adversely affect, and possibly result in the fragmentation of, the league structure of the NFL. This argument would be quite persuasive if these were the facts before us, but, because they are not, we cannot properly express any opin-

ion as to the resolution of a hypothetical conflict. There is no showing whatsoever in the present case that the Chargers have been subjected to more stringent or inconsistent requirements under state law. (Cf. *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 165 (preemption of state statute which undermined uniform federal standards by setting more stringent oil tanker design requirements).) To the contrary, the judgment below is entirely consistent with federal court decisions finding the same practices violative of the Sherman Act. As earlier noted, the trial court was aware of, and in fact relied in part on the federal decisions in *Smith v. Pro-Football*, *supra*, 593 F.2d 1173, *Kapp v. NFL*, *supra*, 390 F.Supp. 73, and *Mackey v. NFL*, *supra*, 543 F.2d 606. Thus, there is uniformity of treatment under both state and federal law. It certainly cannot be argued that state antitrust enforcement has in this case frustrated the purpose of the Sherman Act when the trial court, in complete harmony with its federal counterparts, has simply condemned anti-competitive practices that have already been condemned under federal law. Because both jurisdictions have sought to achieve the same result—elimination of trade restraints—there is no “showing of a specific . . . burdening of . . . interstate commerce.” (*Exxon*, *supra*, at p. 129.) While professional football may indeed be entitled to uniform treatment, it has been provided it by the trial court.²²

The Chargers fall back on one final argument: they contend that they need not show specific, actual conflict but only that *potential* conflict may arise after an initial state and then subsequent states impose their own differing regulations on the activity. I disagree. Numerous Supreme Court

²²I do not mean to suggest that under different factual circumstances state antitrust regulation may not unreasonably burden interstate commerce. Such a case, however, is not before us.

decisions have deferred to concurrent state and federal regulation where the record "contains nothing to suggest the existence of any . . . competing or conflicting local regulations" (*Huron Cement, supra*, 362 U.S. 40, at p. 48) or where the "record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of standards." (*Florida Avocado, supra*, 373 U.S. 132, at p. 143.) Moreover, the limited scope of the present case militates against finding even a potential conflict. As noted earlier, the NFL rules and practices challenged by Partee have been substantially modified pursuant to the settlement in *Alexander*. There was evidence before the trial court that Partee was one of only four players who opted-out of the *Alexander* class and refused to covenant not to sue. Thus, there is potential for conflict *only* if a court in one of the remaining cases rules *in favor* of the NFL, and contrary to the present case and *Smith, Kapp*, and *Mackey*.

"Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does [state] regulation violate the Commerce Clause." (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 474.) On the record before us, I conclude there is no specific burdening of interstate commerce; nor is there a showing of actual or potential conflict in an area where uniformity of regulation is required pursuant to a congressional declaration of policy. "[W]here the application of the Cartwright Act upon interstate commerce is to facilitate competition and not to place a restraint upon it, it is one which conforms with like policies of the federal government. . . ." (*Coors, supra*, at p. 666.)

In sum, the present case illustrates a successful accommodation of state and federal policies. I am simply unable to find that the stringent federal preclusion standard has

been met in this case.²³ Yet, this court today relies on the Chargers' unwarranted and unproven speculations as to a purported irreconcilable undermining of federal law without requiring them to meet their burden of clearly demonstrating that the application of the Cartwright Act in this case inexorably conflicts with the purposes underlying the federal act. The reasoning process which leads the majority to conclude that a citizen of this state is without power to enforce our state's antitrust laws because of the mere existence of concurrent federal regulation of professional football is both legally and factually defective. Though it may be correctly said that the national operations of professional football require uniform antitrust regulation, this alone does not justify ignoring the "thoroughly established" principle that where Congress has not expressly prohibited regulation of a given field, state law "is superseded *only* where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (Kelly v. Washington (1937) 302 U.S. 1 10, italics added.) Our primary inquiry, then, should be whether state antitrust enforcement in this case is so repugnant that it inevitably undermines the purpose of the Sherman Act. As I have explained, we simply have no basis for concluding that state regulation frustrates federal law or policy as nothing in the present record shows that this state has or will impose more stringent antitrust requirements.

Although, "[i]n the final analysis, there can be no crystal clear distinctly marked formula" (Hines v. Davidowitz, *supra*, at p. 67), my review of the case law compels me to

²³ "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." (Florida Lime & Avocado Growers, Inc. v. Paul, *supra*, at p. 142.)

conclude—notwithstanding the aberrant *Flood* decision—that there is a heavy presumption against preemption where state regulation seeks to protect the vital interests of state citizens. By reversing the normal presumption against finding federal preemption, the majority ignore the fact that state enforcement here promotes the very policy goals underlying the enactment of the Sherman Act. Accordingly, under the factual circumstances before us, I cannot agree that the commerce clause precludes state antitrust regulation. I would hold that the trial court had jurisdiction to apply the Cartwright Act to professional football.

For the foregoing reasons I would affirm the judgment.

REYNOSO, J.

APPENDIX 2.

Court of Appeal, Fourth Appellate District, Division One, State of California.

Dennis Partee, Plaintiff and Respondent, v. San Diego Chargers Football Company, etc., Defendant and Appellant. 4 Civ. No. 22549 (Super. Ct. No. 391152).

Filed Feb. 4, 1982.

San Diego Chargers Football Company, a California limited partnership appeals a judgment following a nonjury trial in which Dennis Partee was awarded damages, attorneys fees and costs for the Chargers' breach of contract and violation of the California Antitrust Law (Bus. & Prof. Code § 16700 et seq., "The Cartwright Act"). The Chargers do not contest the breach of contract award. They do contest, however, the court's jurisdiction and decision regarding the antitrust award.

Partee, a California resident, played professional football under contract to the Chargers from 1968 to 1976. Partee was a notable performer playing the positions of punter and placekicker.

The Chargers are a professional football team and a member of the National Football League (NFL). In 1975, the last full year Partee played for the Chargers, the NFL had 26 teams located in 16 states and the District of Columbia. NFL games are regularly broadcast coast to coast over network television and professional football has gained nationwide appeal and international significance. For practical reasons, professional sports must operate within a league structure. In professional football, this structure is characterized by a basic division into two conferences each having divisions composed of certain teams within the conference, and by play according to an ordered schedule between teams within the various divisions and the two conferences. To

promote athletic competition and provide a means of keeping the teams on a par with each other for competitive interest and the business success for the member teams, the NFL has certain operating rules, many of which are embodied in the NFL constitution and by-laws. Partee's antitrust action concerns five of these operating rules as they existed in 1974: the draft, option clause, Rozelle rule, tampering rule and one-man rule.¹ Based on the evidence and the doctrine of collateral estoppel, the court found all but the option clause to violate California antitrust laws.

Since 1968, all NFL players have been represented by the NFL Players Association (NFLPA). In 1970, the NFLPA and NFL management entered a second collective bargaining agreement covering the 1970 to 1973 seasons. No new agreement was reached until March 1977, but this agreement was made retroactive to the expiration date of the prior agreement. This new agreement, which is effective into

¹The draft is a selection system whereby the respective NFL teams are awarded the initial rights to negotiate exclusively with football players graduating from college.

The option clause is a provision of the NFL Standard Player Contract which grants the team the right to renew a player's contract for one additional year if the team and player cannot agree to a new contract. After the option year expires, the player becomes a "free agent" and may negotiate and contract with teams of another league or with other NFL teams subject to the Rozelle rule.

The Rozelle rule is named after the NFL commissioner, Pete Rozelle. This rule provides if a free agent contracts with another NFL team, the new team must compensate the player's former team with draft choice(s) or other player contracts. If the new and former teams cannot agree as to the compensation, the commissioner arbitrates the matter and determines the compensation.

The tampering rule prohibits a NFL team from negotiating with a player currently under contract with another NFL team. Also, if one team has the exclusive right to negotiate with a player, no other team may tamper with that player.

The one-man rule refers to the commissioner's authority to compel a player to adhere to terms of an operative collective bargaining agreement between the players and NFL teams.

1982, contains each of the rules or practices challenged by Partee.²

In 1974, the World Football League (WFL) came into existence and began a "bidding war" with the NFL to supply its need for football players. WFL teams negotiated with former and current NFL players, and Partee was offered \$50,000 to play for the Philadelphia WFL team for a season. Partee employed Mr. Attanasio as a bargaining agent to negotiate a new contract with the Chargers, and Attanasio informed the Chargers of Partee's \$50,000 offer. Eventually, Partee and the Chargers entered a three-year contract. The Chargers agreed to pay Partee \$38,500 in 1974, \$44,000 in 1975, and \$49,500 in 1976 (for a total of \$132,000) subject to the normal terms and policies of the NFL.

In 1976, Partee sued and recovered for breach of contract in that the Chargers failed to pay Partee's 1976 salary. Also, Partee sought and was awarded treble damages, attorneys fee (\$30,000), plus costs for the Chargers' violation of California antitrust laws. Damages were calculated at \$11,500 per year (the difference between the WFL offer and Partee's 1974 salary from the Chargers) for 1974 through 1976, for a total of \$34,500. This amount was trebled for a total damages award of \$103,500 for violating the antitrust laws.

The issues raised in this appeal are complex and resolution is important to professional sports generally. Complicating the applicability of antitrust laws to professional sports is

²This second collective bargaining agreement was negotiated concurrently with antitrust suits brought by players against the NFL. The most significant case, *Alexander v. National Football League* (D. Minn. 1977) 1977-2 Trade Cases (CCH) ¶ 61,730, was a class action. *Alexander* incorporates a settlement which substantially modifies the practices and rules Partee challenges. Thus, most of the problems with unreasonable trade practices are currently obviated by the settlement. The settlement also contains a covenant not to sue (in antitrust) by the class members. However, Partee who filed this suit before the specified cutoff date chose not to be a class member. This agreement terminates in mid-1982.

the confusion created by the special exemption from federal antitrust laws afforded professional baseball but apparently denied other professional league sports. As other cases have noted, this area of the law cries out for legislative resolution (see *Flood v. Kuhn* (1972) 407 U.S. 258, 285 [92 S.Ct. 2099, 2113]). But in the absence of legislative guidance, this court will, as it must, apply the relevant law as logically as possible. The high quality of the parties' briefs aids our task.

The Chargers contend the court lacked subject matter jurisdiction to decide whether they violated the Cartwright Act. The Chargers reason that because professional football is a unique activity of interstate commerce which requires nationally uniform governance, only federal antitrust laws apply. If courts permit the application of state antitrust regulation to professional football's interstate activities, interstate commerce would be unreasonably burdened. Therefore, the Chargers contend, it was a violation of the Commerce and Supremacy Clauses of the Constitution when the trial court found the Chargers violated the California antitrust laws.

It is helpful to first understand what the Chargers *do not* contend and thus what we need not discuss. As their reply brief makes abundantly clear, they do not base their jurisdiction argument on traditional preemption doctrine.³ The Chargers do not claim federal antitrust laws, the Sherman and Clayton Acts, "occupy" the field of antitrust regula-

³The two aspects of traditional preemption doctrine both focus on congressional intent. (1) If Congress clearly manifests an intent to occupy exclusively an area of law (e.g., immigration, postal regulations), states may not regulate. (2) If no such congressional intent is manifested, states have concurrent power and may regulate. However, state laws which conflict with federal laws are preempted. (See, generally, G. Nowak, R. Rotunda, and Joe Young, *Constitutional Law* 267 (West 1978).)

tion. States have concurrent powers in this area, and California has exercised its concurrent power under the Cartwright Act. Nor do the Chargers contend the federal and state laws so conflict as to require preemption of the state scheme. The federal and California antitrust laws, having identical objectives, are harmonious with each other (see *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315).

Finally, the Chargers do not claim professional football is exempt from all antitrust regulation. Rather, the essence of their argument is that federal, not state, law governs.

State "police power" regulations which unreasonably burden interstate commerce are invalid (see *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 781-782 [65 S.Ct. 1515, 1526]). The burden is unreasonable if the state's regulation substantially impedes the free flow of commerce from state to state, or it regulates "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." (*Id.* at p. 767 [65 S.Ct. 1515, 1519], citing *Cooley v. Board of Wardens*, 12 How. 299, 319.)

Though our analysis places emphasis on the quoted portion of the rule of *Southern Pacific*, *supra*, we also bear in mind the general rules:

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest in-

volved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues [citation], but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. [Citation.]" (*Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142 [90 S.Ct. 844, 847].)

More recently, the proper mode of analysis with respect to the question of whether a burden on interstate commerce is permissible has been described as follows:

"[W]e must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden to show discrimination rests on the party challenging the validity of the statute, but '[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.' [Citation.]" (*Hughes v. Oklahoma* (1979) 441 U.S. 332, 336 [99 S.Ct. 1727, 1736].)

Moreover, it is the rule that where the state statute does not discriminate between interstate and intrastate commerce, the controlling question is whether "the incidental burden imposed on interstate commerce by the state is 'clearly excessive in relation to the putative local benefits' " (*Minnesota v. Clover Leaf Creamery Co.* (1981) — U.S. —, — [101 S.Ct. 715, 728], quoting from *Pike v. Bruce Church, Inc.*, *supra*, 397 U.S. 137, 142 [90 S.Ct. 844, 847]).

We think it is sufficiently plain not to require further discussion that the Cartwright Act of this state is nondiscriminating and applies both to interstate and intrastate commerce.⁴ It is equally clear professional football operates in interstate commerce. In light of this and the general principles cited above, this court must balance the burden on the interstate aspects of professional football and any need for nationally uniform antitrust regulation against California's interest in preventing unfair trade practices within its borders. We bear in mind throughout these discussions federal antitrust laws are applicable (*Radovich v. National Football League* (1957) 352 U.S. 445, 452 [77 S.Ct. 390, 394]), and federal decisions under the Sherman Act apply to any antitrust law enforced under the Cartwright Act (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852).

The "burden on interstate commerce" analysis was first applied to professional sports in the baseball context. (*Flood v. Kuhn* (S.D.N.Y. 1970) 316 F.Supp. 271, *affd.* (2d Cir. 1971) 443 F.2d 264, *affd.* 407 U.S. 258 [92 S.Ct. 2099] (1972).) Considering baseball's reserve system⁴ in *Flood v. Kuhn*, *supra*, the trial court found state antitrust laws inapplicable on alternative grounds: preemption and unreasonable burden on interstate commerce.

⁴As considered by the trial court in *Flood v. Kuhn*, *supra*, baseball's reserve system had many of the attributes of the NFL rules and practices of which Partee complains. Baseball's reserve system involved an agreement by all of the teams to be involved in a draft creating exclusive bargaining rights in the club as to the draftee; a uniform player's contract empowering the signing club unilaterally to renew a player's contract from year to year; denial of any right in a player, once signed, to negotiate with any other team; a prescribed number of players per team; and the unilateral right of a team to assign the contract to another team (see *Flood v. Kuhn*, *supra*, 316 F.Supp. 271, 273-275).

Treating the applicability of state antitrust laws to professional baseball as a question of first impression, the second circuit affirmed. (*Flood v. Kuhn, supra*, 443 F.2d 264, 267-268.) Citing *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 774-775 [65 S.Ct. 1515, 1522-1523], the United States Court of Appeals said:

"[W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce." (*Id.*, at p. 267.)

Analyzing the nature of the competition in professional baseball as well as the effect of and need for state antitrust regulation of that competition, the Court of Appeals in *Flood* went on to say and conclude:

"Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severely fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would considerably more far-reaching than that in *Southern Pacific Co. v. Arizona, supra*. On the other hand, we do not find that a state's interest in antitrust regulation, [fn. omitted] when

compared with its interest in health and safety regulation, is of particular urgency. Hence, *as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.*" (443 F.2d at pp. 267-268; italics added.)

Quoting the above underscored portion of the Court of Appeals opinion, the United States Supreme Court said this statement adequately disposed of the state law claims (*Flood v. Kuhn, supra*, 407 U.S. 258, 284-285 [92 S.Ct. 2099, 2113]). The high court affirmed the judgment of the Court of Appeals in *Flood*. It also approved the view expressed by the District Court that application of state antitrust law is precluded because it would conflict with federal policy and "because national 'uniformity [is required] in any regulation of baseball and its reserve system' " (407 U.S. at p. 284 [92 S.Ct. at p. 2113]).

Other cases, both state and federal, have raised the issue of the applicability of state antitrust regulation to professional league sports. In *State of Wisconsin v. Milwaukee Braves, Inc.* (Wis. 1966) 144 N.W.2d 1, Wisconsin sought to enjoin the baseball franchise's planned move from Milwaukee to Atlanta and claimed certain aspects of professional baseball violated its antitrust laws. As in *Flood v. Kuhn, supra*, 443 F.2d 264, the Wisconsin court held state law inapplicable on preemption and burden on interstate commerce grounds.⁵

⁵"[A]pplication and enforcement of a state antitrust law to decisions of the league . . . would conflict with the national policy in this segment of interstate commerce. . . . [¶] Other members of the court prefer the view that [professional baseball activities] require uniformity of regulation, and since organized baseball operates widely in interstate commerce, the regulation . . . [if any] must be prescribed by Congress." (*Milwaukee Braves, Inc., supra*, 144 N.W. 2d at pp. 17-18.)

In *Robertson v. National Basketball Association* (S.D.N.Y. 1975) 389 F.Supp. 867, the court held state antitrust regulation inapplicable to professional basketball because of its interstate nature (389 F.Supp. at p. 880). Noting professional basketball is subject to federal antitrust law (see *Haywood v. National Basketball Association*, 401 U.S. 1204, 1205 [91 S.Ct. 672, 673]), and following *Flood v. Kuhn*, *supra*, 443 F.2d 264, 268, the court found state antitrust regulation is precluded by the interstate nature of professional basketball which is in the "same business" as baseball, involving "substantial volumes of interstate trade and commerce" (389 F.Supp. at p. 881).

A recent Louisiana case held, consistently with *Robertson* and *Flood*, that state antitrust laws cannot be applied to the interstate aspects of the National Basketball Association and its member team, the New Orleans Jazz (*HMC Management v. New Orleans Basketball Club* (La.App. 1979) 375 So.2d 700, 706-707, emphasizing preemption).

A somewhat similar state case regarding professional football is *Matuszak v. Houston Oilers, Inc.* (Tex.Civ.App. 1974) 515 S.W.2d 725. Matuszak claimed his contract with the Oilers violated the Texas antitrust laws and was therefore unenforceable (*id.* at p. 728). Applying *Flood v. Kuhn*, *supra*, 443 F.2d 264, at page 268, the court rejected this claim stating it was considering a question of preemption. From its reliance on the passage in *Flood v. Kuhn*, speaking to the problem of compliance with the strictest state antitrust standard if state regulation were permitted and the lack of particular urgency in the states' interest in antitrust regulation, however, it is apparent the court in *Matuszak* treated an undue burden on interstate commerce as a species of preemption (*id.* at pp. 728, 729). The Texas court concluded antitrust regulation over professional football is a "question for the Federal Courts." (*Id.* at p. 729.)

The authorities we have reviewed reveal the courts throughout the United States have consistently and without exception denied the states the right to enforcement of antitrust regulation of professional baseball, basketball and football. The burden on interstate commerce from such state regulation derives primarily from the need for national uniformity of regulation and the relatively lesser need for involvement by the state authorities. We have not found a single state which has applied its antitrust laws to professional sports engaged in nationwide league competition. The need for California to have a position consistent with the other states involved with professional sports is significant.

Professional football, like professional basketball, is a nationwide business structured essentially the same as baseball (see *Robertson v. National Basketball Association*, *supra*, 389 F.Supp. 867, 881). Professional football's teams are dependent upon the league playing schedule for competitive play, just as in baseball, and any state antitrust regulation must necessarily affect the league structure, again just as in baseball. Fragmentation of that league structure extending across state lines would adversely affect the success of these competitive business enterprises (see *Flood v. Kuhn*, *supra*, 443 F.2d 264, 267-268). The analysis and holding of *Flood v. Kuhn* is persuasive and controlling on the issue of the applicability of state antitrust law to the interstate aspects of professional football. There is no distinguishing the *Flood* facts and holding on the question of the burden on interstate commerce which state antitrust law application would impose. As in *Flood*, we find important the basic interstate commerce characteristics of professional football, particularly as they apply to those aspects of the player-team-league relationships which Partee challenges; the necessity of a nationwide league structure for the benefit of both NFL member teams and the players in terms of

competition; the need for a nationally uniform set of rules governing the league structure; and the potential for conflicting state antitrust decisions which would compel all member teams to comply with the laws of the most strict state.

We recognize California's legitimate interest in regulating unfair trade practices within its borders but believe this interest is outweighed by the above factors in the present case. Adapting the test set forth in *Minnesota v. Clover Leaf Creamery Co.*, *supra*, ___ U.S. ___ [101 S.Ct. 715, 728], we hold the incidental burden imposed on the interstate commerce aspects of professional football by application of California's Cartwright Act is clearly excessive in relation to the putative benefits to the state. The imposition of any restriction on California teams must necessarily affect their foreign counterparts. For example, is Partee, as a member of the Chargers team, to be free to engage in contract talks with the other team representatives while the players residing in Wisconsin, New York and Texas are precluded from engaging in such negotiations? Must teams from other states compensate California teams when hiring out-of-state free agents while at the same time California teams are free to obtain their players without compensation? The league would be virtually destroyed by such diversity of application of individualized state rules. The federal courts constitute the proper forum to resolve the propriety of the interstate activities of professional football.⁶

⁶The federal courts have in fact supplied professional football players with ample antitrust protection. (See, e.g., *Smith v. Pro Football, Inc.* (D.C. Cir. 1978) 593 F.2d 1173, 1177, 1183-1187; *Kapp v. National Football League* (9th Cir. 1978) 586 F.2d 644, 648-650; *Mackey v. National Football League* (8th Cir. 1976) 543 F.2d 606, 616-618, 622; *Alexander v. National Football League* (D.Minn. 1977) 1977-2 Trade Cases (CCH) ¶ 61,730.) On termination of the present collective bargaining agreement, any antitrust violations will be subject to review by the federal courts.

We conclude, by reason of the Commerce Clause of the United States Constitution, the state court lacks jurisdiction to apply the Cartwright Act to professional football operating in interstate commerce. Our resolution of the jurisdiction issue in favor of the Chargers obviates the need for discussion of the other issues raised on appeal.

The judgment awarding damages and attorney fees to Partee based on the violation of Business and Professions Code section 16700 et seq. is reversed. In all other respects, the judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Cologne
COLOGNE, J.

WE CONCUR:

/s/ Brown
BROWN, P.J.
Work,
WORK, J.

APPENDIX 3,

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the County of San Diego.

Dennis Partee, Plaintiff, v. San Diego Chargers Football Company, a limited partnership, et al., Defendants. No. 391152.

Filed Feb. 1, 1980.

The above-entitled cause came on regularly for trial on October 4, 1979 before The Superior Court of the State of California for the County of San Diego, The Honorable Franklin B. Orfield, Judge Presiding. Brian D. Monaghan, Esq. appeared for plaintiff; Wyman, Bautzer, Rothman & Kuchel by Terry N. Christensen, Esq. and Andrew M. White, Esq. appeared for defendant SAN DIEGO CHARGERS FOOTBALL COMPANY. Evidence, both testamentary and documentary was heard by the Court for a period of sixteen trial days. The Court having considered the evidence, the papers filed in support of the positions of each party, as well as all other pleadings, papers and documents on file herein, and having heard argument in open court, and the Court having orally announced its decision on November 5, 1979;

WHEREFORE, good cause appearing therefor, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff is and at all pertinent times was an individual and a resident of the State of California.
2. Defendant SAN DIEGO CHARGERS FOOTBALL COMPANY is and at all pertinent times was a National

Football League member and a limited partnership, organized and existing under the laws of the State of California.

3. In 1974, plaintiff was a veteran NFL player, having originally been drafted by defendant in 1968 and having played for defendant continuously, beginning with the 1968 professional football season.

4. During the period following the expiration of plaintiff's 1973 contract on May 1, 1974, but while plaintiff was still obligated under the "Option Clause" of Paragraph 10 of the Standard Player Contract, plaintiff, either personally or through his agent, negotiated with defendant with respect to the above-referenced contracts for 1974, 1975 and 1976. During these negotiations, the World Football League was then in existence as a competing league, and the Philadelphia franchise of the World Football League had made an offer of \$50,000 for plaintiff's services.

5. On October 2, 1974, plaintiff entered into three one-year contracts with defendant in the form of Standard Player Contracts covering the 1974, 1975 and 1976 professional football seasons, under which plaintiff was to perform services as a kicker.

6. The three contracts entered into between plaintiff and defendant incorporated by reference the NFL Constitution and Bylaws, which included the following rules: (1) The "Draft Rule" contained in NFL Constitution and Bylaws Sections 14.3 and 14.5; (2) The "Tampering Rule" contained in NFL Constitution and Bylaws Section 9.2; (3) The "Rozelle Rule" contained in NFL Constitution and Bylaws Section 12.2; and (4) The "One Man Rule" vesting power to make final interpretations and decisions in the NFL Commissioner.

7. During the 1975 contract year, plaintiff received an injury to his back which temporarily disabled him for a

period of approximately ten days, but he thereafter returned to kicking and kicked for the remainder of that season.

8. During the 1976 contract year, plaintiff again experienced difficulty with his back, which resulted in his being unable to kick on July 25, 1976. As a result of these back problems, plaintiff was unable to kick for the remainder of the 1976 season and is permanently disabled from performing as a professional football kicker.

9. On August 31, 1976, plaintiff was placed on waivers with injury notation by defendant after having been examined by Dr. Paul Woodward, defendant's team physician, on August 24, 1976.

10. On September 1, 1976, Dr. Woodward and defendant's head coach, Tommy Prothro, verified to the NFL Headquarters that plaintiff had been placed on the Injured Reserve List with his injury being described as "chronic low back pain of unknown etiology."

11. On September 6, 1976, one day prior to the last day on which plaintiff could be cut without obligation for any portion of his regular season salary under the contract, plaintiff was given a superficial "release physical" by Dr. Paul Woodward and Dr. Woodward told defendant's management that plaintiff was able to play football.

12. On September 7, 1976, plaintiff was informed by defendant that Dr. Woodward had certified plaintiff fit to play, and further that he had been cut but would not receive any further salary payments under the contract.

13. Also on September 7, 1976, plaintiff was seen by Dr. David Handler, who diagnosed a herniated disc and found plaintiff to be disabled from professional football.

14. During the 1976 contract year, plaintiff was seen by four orthopaedic surgeons: (1) Dr. David Handler, plaintiff's personal physician, who diagnosed a herniated disc

with superimposed low back strain; (2) Dr. Daniel Denenberg, who suspected a herniated disc and recommended a myelogram; (3) Dr. James Schultz, the independent medical consultant selected by defendant's workmen's compensation carrier, who diagnosed a "bulging" disc; and, (4) Dr. Paul Woodward, defendant's team physician, who diagnosed low back strain and tight hamstrings. The examinations of Drs. Handler and Schultz were thorough, whereas the examinations of Dr. Woodward were superficial.

15. On September 8, 1976, when plaintiff's contract was terminated by defendant, plaintiff was not able to perform under the terms and conditions of the contract by reason of his back injury.

16. Under the terms of the 1976 contract, defendant promised to pay plaintiff the sum of \$49,500 in consideration for his services, if he were injured, under the terms and conditions of the agreement.

17. Plaintiff was paid \$4,950 gross salary during the pre-season, but received no salary payments following his termination on September 8, 1976.

18. On December 8, 1976, plaintiff filed the above-referenced action, alleging, among other causes of action not relevant here, the following causes of action: (1) Breach of Contract (First Cause of Action), under which plaintiff sought the remainder of his \$49,500 contract salary; (2) Fraud (Second Cause of Action); (3) Unpaid Wages under Labor Code §203 (Fifth Cause of Action); and, (4) Violations of the Cartwright Act (Sixth Cause of Action), under which plaintiff sought damages of the difference between his contract salaries for 1974, 1975 and 1976 and what he would have earned in the absence of the anticompetitive structure under which plaintiff was forced to negotiate with defendant.

19. The application of the Cartwright Act to plaintiff's factual situation does not create an unwarranted burden upon interstate commerce.

CONCLUSIONS OF LAW

1. To the extent any of the aforesaid findings of fact are deemed to be conclusions of law, or the following conclusions of law are deemed to be findings of fact, they are hereby incorporated by this reference within the proper category.

2. This Court has jurisdiction of the matter herein.

3. Defendant breached the contract dated October 2, 1974 covering the 1976 season by failing to pay the remaining salary under said contract to plaintiff.

4. Plaintiff performed all terms and conditions required of him under said contract which were capable of being performed.

5. The damages accruing under the First Cause of Action (Breach of Contract) are \$49,500 under Paragraph 3 of said contract, minus the payments made during the pre-season of \$4,950, and further reduced by the entire workmens compensation award of \$14,000, for a net amount of \$30,550, plus interest at the legal rate from September 8, 1976 to the present.

6. Insufficient evidence of fraud exists (Second Cause of Action) and the Court finds in favor of defendant on said cause of action.

7. With regard to the Fifth Cause of Action for unpaid wages under Labor Code §203, the Court concludes that said section applies only if plaintiff had actually worked during the period, as opposed to having been assigned to the injured reserve category, and consequently the Court finds in favor of defendant on the Fifth Cause of Action.

7.1. No labor penalty is appropriate in this case because the Court finds and concludes that defendant's management, acting on information provided by Dr. Woodward, acted in good faith and had what they considered to be just cause for declining to pay plaintiff for the balance of his 1976 contract.

8. With respect to the Sixth Cause of Action regarding antitrust violations under the Cartwright Act, the Court finds that both the Sherman Act and the Cartwright Act, California Business & Professions Code §16720, et seq., apply to the situation before the Court.

9. The facts of this case present no undue burden upon interstate commerce, nor is there any preemption of the field by the Sherman Act or other federal statutes or the Constitution under the facts presented in this case.

10. Under the evidence presented in this case, the "Rozelle Rule," the "Draft Rule," the "One Man Rule" and the "Tampering Rule" each constitute unreasonable restraints of trade and as such violate the Cartwright Act.

10.1. The Court also follows the federal cases holding that the Rozelle Rule, the Draft Rule, the One-Man Rule, and the Tampering Rule are unreasonable and illegal restraints of trade. *Smith v. Pro Football Inc.*, 420 F.Supp. 738 (D.D.C. 1976), *rev'd in part, aff'd in part*, 593 F.2d 1173 (D.C. Cir. 1979); *Kapp v. National Football League*, 390 F.Supp. 73 (N.D.Cal. 1974) (on motion for partial summary judgment), 586 F.2d 644 (9th Cir. 1978) (after trial); *Mackey v. National Football League*, 407 F.Supp. 1000 (D.Minn. 1975), *rev'd in part, aff'd in part*, 543 F.2d 806 (8th Cir. 1976), *pet. for cert. withdrawn*, 434 U.S. 801 (1977). Based on the doctrine of collateral estoppel, the Court applies the foregoing cases to find and conclude that the Rozelle Rule, the Draft Rule, the One-Man Rule, and

the Tampering Rule in 1974 violated the Cartwright Act.

11. Based on the WFL offer to plaintiff of \$50,000, the Court finds and concludes that plaintiff's salary of \$38,500 in 1974 was \$11,500 less than it would have been if defendant and the other NFL teams had not been violating the antitrust laws. Based on this finding and conclusion for 1974, and the assumption of the Court that plaintiff's salary from the WFL would have increased the same \$11,500 each year, the Court finds and concludes that plaintiff's salaries in 1975 and in 1976 were also \$11,500 less than they would have been, absent an antitrust violation. For the three years at issue in this case, 1974, 1975, and 1976, the Court finds and concludes that plaintiff sustained total damages of \$34,500 as a result of antitrust violations by defendant.

12. Judgment will accordingly be entered under the Sixth Cause of Action for treble damages under the Cartwright Act in the amount of \$103,500, plus costs and attorneys' fees of \$30,000. Interest on said antitrust damages shall run from the date of judgment.

Dated: Feb. 1, 1980.

/s/ F.B. Orfield

Judge of the Superior Court
FRANKLIN B. ORFIELD

FILED

MAR 1 1984

ALEXANDER L. STEVAS.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1077

DENNIS PARTEE,

Petitioner,

v.

SAN DIEGO CHARGERS FOOTBALL COMPANY,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of
the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
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OCTOBER TERM, 1983

No. 83-1077

DENNIS PARTEE,

Petitioner,

v.

SAN DIEGO CHARGERS FOOTBALL COMPANY,

Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Question Presented

Whether the Supreme Court of California erred in deciding that the burden threatened to be imposed on interstate commerce by applying California's antitrust statute to rules of governance of the National Football League regarding player recruitment outweighs California's interest in applying its antitrust statute to those rules?

STATEMENT

Dennis Partee, the petitioner, was employed as a professional football player by the San Diego Chargers Football Company, the respondent, from 1968 through 1976. In 1976 petitioner sued respondent for damages, claiming that respondent had violated California's antitrust statute, California Business and Professions Code, §16700 *et seq.* (the Cartwright Act). According to petitioner, respondent violated California antitrust law by complying with five separate rules of governance of members of the National Football League (hereinafter referred

to as the "NFL"). Although petitioner did not formally name the National Football League as a defendant, the essence of petitioner's claim is that the NFL rules themselves offend California's statute and that respondent is required by California law to disregard the league rules, whatever the consequences for all members of the league.

Petitioner was drafted by respondent in 1968. Petitioner played his third season with respondent, 1970, pursuant to the option clause of his 1969 contract, because petitioner had not signed a new contract. In July 1971, petitioner signed a retroactive contract for the 1970 season, and also signed a series of three one-year contracts with respondent for the three succeeding years (1971-1973). (R.T. III:46-67.)*

In 1974, NFL teams became involved in a bidding war for active players with the newly-created World Football League (hereinafter referred to as the "WFL"). (R.T. IV:455-456, IX:1256-1257.) Petitioner received an offer from a WFL team, the Philadelphia Bell, to play in the WFL for \$50,000 for the 1974 season. (R.T. IV:449, IX:1259, XI:12.) Respondent's ownership told its top management to do whatever was necessary to retain its players, and specifically named petitioner as a player who should not be lost to the WFL. (R.T. VIII:32.) As a result of negotiations between respondent and petitioner's agent (who had been told by petitioner that petitioner wanted to stay in San Diego "at almost any cost"), petitioner signed three additional one-year contracts, for the 1974, 1975 and 1976 seasons, for total compensation of \$132,000. This amount was \$4,000 to \$7,000 more than petitioner's initial demand, although not guaranteed in the event that petitioner was unable to make the team in future years. (R.T. XI:14, 18-19, 22-24.)

Petitioner filed suit against respondent in 1976, alleging, *inter alia*, that in 1974, when he negotiated his three one-year employment contracts with respondent, his business or property interests were damaged by certain NFL rules and practices, in violation of the Cartwright Act. Accordingly, petitioner

* References are to the Reporter's Transcript.

claimed that the Cartwright Act made it unlawful for respondent to comply with certain rules of governance of the NFL.

The first of the NFL rules challenged by petitioner is the college draft, the procedure whereby each NFL member is allocated the initial right to negotiate exclusively with designated football players from each year's college senior class. Each NFL member is permitted to choose from the college seniors in the inverse order of that member's win/loss standing at the end of the preceding football season. (R.T. VII:954.)

The second NFL rule challenged by petitioner is the option clause, a negotiable provision in the NFL Standard Player Contract. In 1974, the option clause provided the employer the right to renew the player's contract for a further period of one year (at no less than 90% of the player's last year's salary), in the event the employer and the player were unable to agree on a contract for a further period. (R.T. III:64, VI:889-891, VII:914.)

The third challenged rule is the so-called Rozelle Rule, which required each NFL member to adhere to a determination by the NFL Commissioner (then, as now, Pete Rozelle) regarding the compensation to be given to one NFL team when a second NFL team contracts with a player who was formerly under contract with the first team, in those instances where the two teams cannot agree on such compensation. (R.T. III:72, VII:964-965.)

Petitioner also challenged the no tampering rule, which prohibits one NFL member from negotiating with a player while that player is under contract with another NFL member. (R.T. VII:963.)

Petitioner also sought to challenge a so-called "one-man rule," even though no such rule exists. "One-man rule" was a pejorative term that originated in the case of *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979), and the term is limited to *Kapp*, where the NFL Commissioner had exercised the authority (which was specifically accorded to him by an operative collective bargaining agreement) to re-

quire a player to adhere to collectively-bargained terms of his employment with a league member.

After a non-jury trial, the trial court held that the Rozelle Rule, the draft, the no tampering rule, and the so-called "one-man rule," but not the option clause, violated the Cartwright Act. (Petitioner's Appendix 3, p. 66.)

The California Court of Appeal reversed the trial court's judgment, holding that the application of California antitrust law to the NFL player-recruitment rules challenged by petitioner would so burden interstate commerce as to violate the Commerce Clause of the Constitution of the United States. (Pet. App. 2, p. 48.)

The Supreme Court of California agreed with the decision by the Court of Appeal, and likewise reversed the trial court's antitrust decision in petitioner's favor (Pet. App. 1, p. 1.) The California Supreme Court based its decision on the principle that a sports league (such as the NFL) requires uniform rules applicable to all its members if there is to be a fair opportunity for competitive parity, and in the case of a league having members in several states (such as the NFL), uniformity is impossible if each state can alter the rules as it chooses for those members of the league based within its borders. See, R.T. XII:151-154, 163-164. Thus, the court reasoned, to apply California's antitrust statute so as to prevent California-based teams from complying with NFL rules of general nationwide applicability would place a burden on interstate commerce in the professional league football business that outweighed California's interest in applying its antitrust statute to the league rules in question. (Pet. App. 1, p. 7.) Petitioner seeks review of that decision.

SUMMARY OF ARGUMENT

This Court should not grant certiorari because there is no conflict among the Circuits or among the state courts as to the issue before the Court, and because the California Supreme Court correctly decided that this Court's decision in *Flood v. Kuhn*, 407 U.S. 258 (1972), prohibits the application of state antitrust law to the activities of multi-state professional sports leagues.

ARGUMENT

1. No Conflict Exists Among the Circuits or Among State Courts

No conflict exists among the courts as to the inapplicability of state antitrust law to the interstate operations of professional sports leagues. As the two California appellate decisions in this case make clear, petitioner has not been able to point to any case, State or Federal, upholding the applicability of State antitrust law to sports league employment issues or to any other aspect of the interstate operations of sports leagues. Those decisions holding that state antitrust laws do not apply to the employment rules of multi-state professional sports leagues include *State v. Milwaukee Braves, Inc.* 31 Wis. 2d 699, 731, 144 N.W. 2d 1, *cert. denied*, 385 U.S. 990 (1966) (State antitrust regulation of baseball prohibited); *Matuszak v. Houston Oilers*, 515 S.W. 2d 725 (Tex. Civ. App. 1974) (Under *Flood v. Kuhn*, state antitrust laws not applicable to the interstate rules and practices of the NFL); *Robertson v. National Basketball Association*, 389 F. Supp. 867, 880-881 (S.D.N.Y. 1975) (Under *Flood v. Kuhn*, state antitrust laws not applicable to reserve system, uniform player contract, or draft of the National Basketball Association); *HMC Management Corp. v. New Orleans Basketball Club*, 375 So. 2d 700 (La. Ct. App. 1979), *cert. denied*, 379 So. 2d 11 (La. 1980) (Under *Flood v. Kuhn*, state antitrust laws not applicable to employment practices of the National Basketball Association).

2. The Decision of the California Supreme Court Is Correct

a. The Flood v. Kuhn Test For Determining When State Antitrust Law Would Burden Interstate Commerce Is Not Limited To Baseball Leagues.

The business of multi-state professional league football is interstate commerce (*Radovich v. NFL*, 352 U.S. 445 (1957)), and petitioner does not argue that the record shows any difference in the rules of governance for player recruitment, as between football leagues and baseball leagues, that requires that multi-state football leagues and multi-state baseball

leagues be distinguished for purposes of interstate commerce. In short, nothing in the facts of commercial life support a distinction in the Constitutional treatment of professional league baseball and professional league football. Rather, petitioner suggests that the two sectors of commerce should be treated differently under the Constitution solely because, by reason of *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), and *Flood v. Kuhn*, only one of them—professional league baseball—is outside the reach of the Sherman Act.

There is no merit to this argument. In the first place, the reason that the Sherman Act does not reach baseball is not because baseball is outside the reach of the Commerce Clause. In *Flood v. Kuhn* this Court stated, "Professional baseball is a business and it is engaged in interstate commerce." 407 U.S. at 282. Rather, the non-application of the Sherman Act to baseball derives from the unique legal history of baseball described in *Flood v. Kuhn*. 407 U.S. 269-282. In the second place, the reason to protect interstate commerce from disruptive state antitrust law sanction is the same for baseball and football leagues. In each case the league cannot survive if some members are restrained from competing on an equal footing with other members in the recruitment of players. The college draft of the National Football League is a good example. If the San Diego Chargers were legally required (as a result of a Cartwright Act ruling such as the trial court decision in this case) to recruit players without going through the NFL college draft, but other NFL members were bound by the results of the NFL college draft, these other clubs would be seriously disadvantaged. Ultimately, the NFL would be forced to restore parity of opportunity by abolishing the draft altogether.

If that occurred in the case of a league in which all the teams were domiciled and played only in California, it would be hard to find an undue burden on commerce among the several states. But that is not the case here, anymore than it was in *Flood v. Kuhn*. In the instant case, at the time of petitioner's suit the league had members domiciled in 18 states and the

District of Columbia. If California could prevent NFL clubs domiciled in that state from adhering to the recruiting restrictions imposed by the NFL college draft, California would have forced a nationwide interstate enterprise to be conducted everywhere the way California wants it conducted, and would have invited the adoption of preferential laws in other states.

Such a drastic effect on interstate commerce, in the judgment of the California Supreme Court, would be out of proportion to any resulting benefit to California, and therefore would unduly burden commerce among the several states. That decision is consistent with the teaching of *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), i.e.,

Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the [Commerce] Clause protects. *Dean Milk Co. v. Madison*, 340 US 349, 356, 95 L Ed 329, 71 S Ct 295 (1951).

Also, the California Supreme Court's decision is on all fours with one of the holdings in *Flood v. Kuhn*, 407 U.S. 258 (1972). In *Flood v. Kuhn*, after declining to overturn earlier decisions holding that the Sherman Act did not reach professional baseball leagues, this Court further held that it would unduly burden interstate commerce to subject the player-relations rules of multi-state professional baseball leagues to state antitrust law. *Flood v. Kuhn*, 407 U.S. at 284-285. Adopting language from the Second Circuit Court of Appeals, this Court clearly enunciated a ruling of Constitutional law that governs this case, as follows: "[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." *Flood v. Kuhn*, 407 U.S. at 284.

Despite this clear ruling, petitioner argues that state law was not set aside in *Flood v. Kuhn* on Commerce Clause-burden

grounds, but on "preemption" grounds. Preemption describes the operation of the Supremacy Clause of the Constitution: The "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. In *Flood v. Kuhn*, this Court mentioned no Constitutional provision, no federal law and no treaty with which anything in state antitrust law conflicted, and the petitioner here does not argue that the Court in *Flood v. Kuhn* had any particular Constitutional clause, federal statute or treaty in mind. Rather, the petition suggests that the Court held state law preempted by a "judicially created" exemption from federal antitrust law. (Pet. at 14.) Before *Flood v. Kuhn*, this Court had not equated judicial decisions with Constitutional clauses, statutes or treaties for purposes of the Supremacy Clause, and petitioner does not suggest any reason why this Court would establish a new and far-reaching principle of Constitutional law in *Flood v. Kuhn* without even one word of explanation. In short, the argument that *Flood v. Kuhn* is a preemption case confined to baseball is absurd.

b. The Record Supports The California Supreme Court's Conclusion That Requiring Compliance With California's Antitrust Law Would Unduly Burden Interstate Commerce.

The petition asserts that the California Supreme Court based its decision on a "hypothetical burden" on interstate commerce. (Pet. at 14.) Petitioner is correct; there has been no actual burden on interstate commerce from the application of California antitrust law to respondent's conduct because the California Supreme Court, by its decision below, prevented California's Cartwright Act from having that effect. However, that fact does not aid petitioner. Courts do not have to wait for the burden to be inflicted. The "validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980).

Moreover, the California Supreme Court's "hypothesis" as to burden on commerce is supported by the record, because each NFL member, wherever located, is obliged as a condition of league membership to adhere to the league's rules. NFL members are domiciled and conduct business in many different states, but the league's player-recruitment rules apply to all members, wherever located, to insure parity of competitive opportunity, and non-compliance with the rules by any member would competitively disadvantage all members in player recruitment, thereby requiring the league to restructure its business nationwide to suit the ends of a single state's antitrust law. (R.T. XII: 151-154; 163-164.) Just as in *Flood v. Kuhn*, the court below properly concluded that imposition by California of such a burden on interstate commerce violated the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Dated: March 1, 1984